Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of QWEST COMMUNICATIONS INTERATIONAL INC., Transferor and CENTURYTEL, INC. D/B/A CENTURYLINK, Transferee Application for Transfer of Control Under Section 213 of the Communication Act, as Amended	)	WC Docket No. 10-110 ITC-T/C-20100510-00183 ITC-T/C-20100511-00188 ITC-T/C-20100511-00190 File No. 0004229927 File No. 0004231340 File No. 0004231345 File No. 0004231348 File No. 0004232216 File No. 0004236172 SCL-T/C-20100510-00012

COMMENTS OF JOINT COMMENTERS

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Due: July 12, 2010

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[1] Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc., d/b/a CenturyLink for Consent to Transfer of Control - Pleading Cycle Established, WC Docket No. 10-110, Public Notice, DA 10-993 (rel. May 28, 2010).

I. INTRODUCTION AND SUMMARY

As an initial matter, the Application is deficient in providing information sufficient to enable the Commission to determine whether or not the proposed merger is in the public interest. Among other things, Applicants have provided no information as to whether or how differences in operational procedures between the CenturyLink operating companies and the Qwest operating companies will be reconciled, including the impact the transaction will have with respect to their OSS. These OSS processes are of critical importance to their wholesale customers, as well as to retail customers. Qwest's OSS has been found by the Commission to be compliant with a Bell Operating Company's ("BOC's") obligations under Section 271, while CenturyLink's has not. Because the Application is silent on which company's OSS will be used post-merger, the Commission cannot be assured that Qwest's BOC companies will continue to satisfy the level of OSS functionality that this Commission has said is necessary to support competitive markets in their exchanges, as required by Section 271. It also cannot be assured that the Applicants will not use this opportunity to switch OSS to disrupt the provisioning process to their CLEC rivals, thus placing those rivals at a competitive disadvantage

In addition, while the Applicants admit that they compete head-to-head in a number of markets and operate in hundreds of adjacent territories, the Application fails to provide data sufficient for the Commission to determine the full impact caused by the loss of this actual and potential competition in various markets, including the product markets for special access and retail large business services in the locations in which Applicants are actual or potential competitors. The Commission should not approve the merger until Applicants remedy these informational deficiencies.

Even the limited information that is provided does, however, show that substantial harms to competition will result from the merger. Such harms include the removal of one of a very small number of very large LECs that are actual or potential competitors in Qwest and CenturyLink territories, reduction in the ability of this Commission, state commissions, and wholesale and retail customers to benchmark the practices of large ILECs against other large ILECs, and increased incentive and ability of the Applicants to discriminate against their rivals.

Applicants have attempted to offer as counterweights against any harms that will result from the merger several "public interest benefits" that allegedly will result from the merger. A careful review of Applicants' examples shows, however, that Applicants have failed to provide factual support sufficient to demonstrate that any of the benefits that are asserted to flow from the merger is actually a public interest benefit that would not be realized absent the merger. For example, the Applicants argue that the public will benefit from the merger because they will "continue" to focus on serving rural communities, as they are doing today.[2] It should be self evident that continuing to do post-merger what it was doing pre-merger is not a benefit that is "merger-specific" in that it is "likely to be accomplished as a result of the merger but unlikely to be realized by other means."[3] As another example, Applicants claim that the merger "will facilitate the deployment of broadband to more customers."[4] Applicants' claim is wholly conclusory and lacks any empirical or evidentiary support. Applicants also point to projected cost savings resulting from the merger, but offer no assurance that any of these predicted savings will inure to the benefit of the public through lower retail or wholesale prices or through investment in research and development for innovative new products and services. If the

[2] Application at 19-20.

[3] *Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, WC Docket No. 08-238, Memorandum Opinion and Order, 24 FCC Rcd 8741, ¶ 35 (2009) ("*CenturyTel/Embarq Merger Order*") (citing *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, ¶ 202 (2007) ("*AT&T/BellSouth Merger Order*")).

[4] Application at 13.

supposed cost savings are simply passed on to shareholders through larger dividends, that would certainly benefit the shareholders, but it would not constitute a "public interest benefit" as this Commission has used that phrase, because to be a "public interest benefit," cost savings must "result in lower prices, improved quality, enhanced service or new products,"[5] not increased shareholder profits. The Application makes no attempt to show that any of these benefits to the public (as opposed to shareholders) will result from the projected cost savings.

Noticeably absent from the Application are any proposed merger conditions or commitments that would offset the harms resulting from the merger. Joint Commenters propose a series of merger conditions that, in the aggregate, would offset the public harms that will result from the merger. The proposed conditions are designed to replace the benefits of actual and potential competition between CenturyLink and Qwest that will be lost by virtue of the merger with a stimulus to intramodal competition within the combined company's region from competitive carriers. Most of these proposed conditions were employed in prior mergers involving one or more BOCs. Joint Commenters have, however, adapted the conditions they propose to developments in the marketplace and the overall regulatory framework that have taken place since the AT&T/BellSouth merger, which was the last merger involving BOCs, was approved by the Commission in 2007.

II. STANDARD OF REVIEW

As the Commission has held, "the Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction serves the public interest."[6] If "the

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5 *AT&T/BellSouth Merger Order,* ¶ 201 (internal quotes and footnote omitted).

6 *In the Matter of Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, WC Docket No. 09-95, Memorandum Opinion and Order, 25 FCC Rcd 5972, FCC 10-87, ¶ 9 (Rel. May 21, 2010) ("*Frontier/Verizon Merger Order*").

record presents a substantial and material question of fact, [the Commission] must designate the applications for hearing."[7]

The Commission "considers whether a transaction will enhance, rather than merely preserve, existing competition."[8] In evaluating merger applications, the Commission asks "whether the combined entity will be able, and is likely, to pursue business strategies resulting in demonstrable and verifiable benefits that could not be pursued but for the combination."[9] Claimed benefits must be transaction- or merger-specific.[10] The claimed benefit "must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects."[11] "Efficiencies that can be achieved through means less harmful to competition than the proposed merger … cannot be considered to be true pro-competitive benefits of the merger."[12] Claimed benefits must also be verifiable.[13] The Applicants must demonstrate that the proposed merger "is a reasonably necessary means" to achieve the

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[7] *Id.*

[8] *Id.* ¶ 11.

[9] *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, ¶ 182 (2005) ("*SBC/AT&T Merger Order*").

[10] *Id*. ¶ 184.

[11] *Id*. (citing *Application of Echostar Communications Corp., General Motors Corp., and Hughes Electronics Corp., Transferors, and Echostar Communications Corp., Transferee*, CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, ¶ 189 (2002) ("*EchoStar/DirecTV Order*")).

[12] *Id*. n.517 (citing *In the Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, ¶ 158 (1997) ("*Bell Atlantic/NYNEX Merger Order*")).

[13] *Id*. ¶ 184.

purported benefits.[14] "A mere recitation by the Applicants that they will provide some benefit if and only if their license transfer is approved cannot suffice to show that such a benefit is merger specific."[15] "[S]peculative benefits that cannot be verified will be discounted or dismissed."[16] The Commission applies a sliding scale approach under which substantial and likely harms require that claimed benefits show a higher degree of magnitude and likelihood than it would otherwise demand.[17]

The Commission has recognized that:

> the same consequences of a proposed merger that may be beneficial in one sense may be harmful in another. For instance, combining assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create or enhance market power, increase barriers to entry by potential competitors, and/or create opportunities to disadvantage rivals in anticompetitive ways.[18]

The Commission's public interest authority enables it to rely on its "extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the transaction will yield overall public interest benefits."[19]

III. THE APPLICATION FAILS TO PROVIDE IMPORTANT INFORMATION CONCERNING ISSUES OF LIKELY COMPETITIVE IMPACT

In order for the Commission to evaluate benefits and harms of a proposed merger, the Applicants must submit sufficient verifiable information about the merger. The Applicants have failed in several respects to do so.

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14 *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 267 (1999) ("*SBC/Ameritech Merger Order*").

15 *Id*.

16 *Id.*

17 *Id*. ¶ 185; *see id.* ¶ 256 (1999) (citing *Bell Atlantic/NYNEX Merger Order*, ¶ 157).

18 *AT&T/BellSouth Merger Order,* ¶ 12.

19 *Frontier/Verizon Merger Order*, ¶ 12.

A. Applicants Have Provided No Information as to the Impact the Transaction Will Have With Respect to their Operational Support Systems ("OSS")

Applicants have not provided any details as to whether or how differences in operational procedures between the CenturyLink operating companies and the Qwest operating companies will be reconciled. They do not indicate whether CenturyLink will be adopting Qwest policies with regard to any specific issues or vice-versa, of if each of the Applicants will maintain its current practices.

Applicants claim that integration that will allegedly result from the merger is a key benefit, citing "operational synergies" and referencing the Commission's recognition of such matters in prior mergers.[20] While the Application references the Commission's findings in the *CenturyTel/Embarq Merger Order* ¶¶ 44-45, those findings made clear how CenturyTel and Embarq intended to reconcile differences in procedures. The Order stressed the benefits of "adopting CenturyTel's billing software and Embarq's wholesale OSS."[21] Likewise, in the *Frontier/Verizon Order*, the Commission devoted 13 paragraphs to a thorough discussion of every respect in which OSS of the merging parties would be affected by the transaction and evaluating the "voluntary commitments" that the applicants had made to mitigate the risks of harm to wholesale and retail customers resulting from transfers in OSS.[22] Similarly, in the *Ameritech/SBC Merger Order* and the *Bell Atlantic/GTE Merger Order*, the Commission evaluated the impact of the merger on the applicants' OSS in the context of their voluntary

[20] Application at 21-22.

[21] *CenturyTel/Embarq Merger Order*, ¶ 45.

[22] *Frontier/Verizon Merger Order*, ¶¶ 26-38; *see* Appendices C and D, pp. 32-37 (identifying merger conditions relating to OSS).

commitments, including commitments to develop and deploy uniform OSS systems and interfaces across the combined territory of the merging parties.[23]

Wholesale services are an essential component to increasing telecommunications competition generally and particularly to increasing broadband deployment and uptake throughout the United States. High quality, electronically bonded wholesale OSS are the key to the ability of competitors to provide their customers with timely, accurate and competitively priced services. There are very significant differences between the OSS of Qwest and the OSS of CenturyLink.[24] Attached as Exhibit A is a chart reflecting those differences. Among the most significant differences are:

- If a CLEC submits more than 50 orders per day to CenturyLink, the orders may be subject to project management, and standard intervals will not apply. This limit is well under the number of orders that some CLECs submit to Qwest on an average day.

- Qwest processes transactions in real time, while CenturyLink processes transactions in batches, resulting in delayed order response.

- Qwest notifies CLEC of incorrect field entries before accepting the order, enabling prompt order revision, while CenturyLink will accept an order with invalid field entries, rejecting it later and requiring submission of a new order.

Because of these and other differences in OSS, if CenturyLink were to transition Qwest's wholesale OSS to CenturyLink's existing wholesale OSS, this backward step would be a disaster for the competitive local exchange market, for individual competitors such as Joint Commenters and for consumers generally. As reflected in the record of the Commission's proceeding

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[23] *SBC/Ameritech Merger Order*, ¶¶ 381-385; *See Applications of GTE Corp. and Bell Atlantic Corp.*, CC Docket No. 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032, ¶¶ 285-295 (2000) ("*Bell Atlantic/GTE Merger Order*").

[24] Likewise there are very significant differences in the repair systems and related intervals of Qwest and CenturyLink.

regarding the Frontier/Verizon transaction, prior transactions in which an BOC's assets were taken over by a non-BOC ILEC have brought disastrous consequences with respect to wholesale OSS, significantly impeding the ability of competitive carriers to bring the benefits of competition to consumers[25]

Yet in sharp contrast with the prior transactions discussed above, and despite substantial differences in their OSS, Applicants here say absolutely nothing about which party's OSS will be used, or if each of the Applicants will continue to use its own, and make no commitments to mitigate harm to retail or wholesale customers that may result from changes in OSS. Thus, absent more detail, Applicants' claims of cost savings are precisely the type of "vague claims of operational efficiencies" that the Commission described in the *CenturyTel/Embarq Merger Order* as "difficult to evaluate" and "unpersuasive."[26]

A careful regulatory review of the OSS issue is especially imperative in reviewing this transaction since it represents the first time in which a BOC, whose OSS was subject to thorough third party testing and regulatory scrutiny, and accompanying anti-backsliding remedy plans, would be combined with an entity whose OSS has never been subjected to any third party testing, let alone been subjected to anywhere near the same level of order volume as the BOC. All prior BOC-related merger transactions involved OSS systems that (a) were subjected to 271-scrutiny post-transaction, or (b) had previously passed 271 regulatory scrutiny on an independent basis. It would be difficult to find that the proposed transaction is in the public interest if the Applicants are unwilling to demonstrate how the OSS that is used in Qwest's BOC territory will, post-transaction, continue to satisfy the 271 required level of OSS functionality that this

[25] Petition to Deny of TW Telecom Inc., One Communications Corp., Integra Telecom, Inc., and CBeyond, Inc., WC Docket No. 09-95, at 4-6 (filed Sept. 21, 2009).

[26] *CenturyTel/Embarq Merger Order,* at n.136 (quoting *GTE/Bell Atlantic Merger Order*, ¶ 242).

Commission required to support competitive markets in their exchanges. Given the Commission's clearly stated goal in its National Broadband Plan that there must be adequate wholesale services in place to support broadband competition, it would counter-productive to reaching that goal if this transaction were approved without ensuring that the combined entity had an OSS in place that would foster broadband competition.

The Commission should also be mindful that changes in operating procedures can be extremely expensive and disruptive to CLECs, who have invested substantial amounts to conform to the Applicants' existing OSS. The Commission has previously recognized the importance of nondiscriminatory access to OSS to the ability of CLECs to compete on a commercially reasonable basis.[27] It can be very resource intensive for CLECs to change OSS procedures and interfaces, although such a change may ultimately prove worthwhile from the CLEC's point of view if the change is to a substantially more CLEC-friendly OSS. Based on the complete absence of information they have provided, it is possible that the Applicants will choose to make the least competitor friendly, rather than most competitor friendly, OSS and other practices uniform across their combined region after the transaction closes outside of regulatory scrutiny. In fact, if Applicants choose to change operating procedures, the process they use provides an opportunity for competitively disadvantaging CLECs by imposing changes that are costly to CLECs or that carry a potential for disruption of provisioning of CLEC services to new and existing customers.

For these reasons, as a first step to evaluating the Application, the Commission should require the Applicants to disclose fully their plans for modifying or integrating key competitively

[27] *Application of BellSouth Corporation et al for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, CC Docket No. 98-191, 13 FCC Rcd 20599, ¶ 83 (1998).

sensitive operating procedures and practices. This should include planned changes, timing, and procedures that would be followed to implement any changes (including whether the Applicants plan to use any independent third party testing to ensure that any OSS changes will continue to satisfy the ongoing 271 obligations that will remain in place in the Qwest exchanges), as well as any efforts Applicants intend to make to train CLEC personnel who may have to adapt to new OSS procedures. Interested CLECs should then be provided an opportunity to propose appropriate changes or conditions to assure that the Applicants' touted "increased operational efficiencies"[28] will not harm competition.

B. Applicants Have Failed to Provide Data Necessary to Show that Competition with Respect to Wholesale Special Access in the Applicants' Territory Will Not Be Harmed by the Merger.

Applicants have failed to provide data sufficient to show that competition with respect to wholesale special access in the Applicants' territory will not be harmed by the merger. Applicants admit that each has built facilities to customers in the other's ILEC territories,[29] but make no effort to quantify the extent to which they are in a position to provide special access to customers in the same buildings. Indeed, they note vaguely (as if Qwest is unable to keep track of the locations where it has constructed its own network facilities) that "it is possible that, within Qwest's 14-state region, Qwest has built facilities to individual customers within CenturyLink territory."[30]

In a similar merger involving an IXC that served enterprise customers within the territory of the merging ILEC, the Commission, despite the contention of the merging parties that "the

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[28] Application at 21.

[29] *Id*. at 22-28, 32-34.

[30] *Id*. at n.36.

impact of this merger on potential wholesale special access competition is truly *de minimus*,"[31] required a far more rigorous analysis, recognizing that "wholesale special access is a critical input for competitive LECs in providing services to their retail enterprise customers," as well as for other purposes.[32] As a condition of approval, those applicants--AT&T and BellSouth--"voluntarily committed to divest IRUs" to buildings where the merging parties were the only carriers possessing a direct connection and competitive entry was unlikely.[33] The Commission devoted 35 paragraphs of its order to a thorough review, including a "detailed building analysis" provided by the applicants.[34] Similarly extensive analyses and divestiture commitments were undertaken in the SBC/AT&T and Verizon/MCI mergers.[35] In these cases, the Commission concluded that the elimination of competition between the merging parties in the provision of special access in certain buildings was "likely to result in anticompetitive effects," including increases in special access prices on an MSA-wide basis, absent "appropriate remedies."[36] In the complete absence of any data regarding buildings in which CenturyLink and Qwest both have direct connections, and in the absence of any voluntary divestiture, it is impossible for the Commission to reach the conclusion that there will be no similar harms requiring remedies in the wholesale special access market.

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[31] *AT&T/BellSouth Merger Order*, ¶ 43.

[32] *Id.* ¶ 27.

[33] *Id.*

[34] *Id.* ¶¶ 27-61.

[35] *See SBC/AT&T Merger Order*, ¶¶ 24-55,: *Verizon Comm., Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, ¶¶ 24-55 (2005) ("*Verizon/MCI Merger Order*").

[36] *SBC/AT&T Merger Order*, ¶ 32: *Verizon/MCI Merger Order*, ¶ 32.

C. Applicants Fail to Provide Critical Market Data Associated With Overlapping and Adjacent Territories and Retail Enterprise Competition

Applicants also fail to provide critical market data associated with overlapping and adjacent territories and retail enterprise competition. Applicants admit that they compete head-to-head in a number of geographic markets, including Minneapolis, Puget Sound/Gray Harbor, Orlando, Huntsville and in unspecified locations for retail enterprise customers.[37] Rather than providing hard data, their claim that no adverse effect on competition will result from the loss of a competitor as a result of the merger is based on generalities, such as "this is a dynamic market with multiple major competitors, and highly sophisticated customers,"[38] and naming CLECs that allegedly compete within certain metropolitan areas, without providing any data regarding the CLECs' competitive significance. Qwest itself has recognized that such an approach is inadequate. In its Petition to Deny the SBC/AT&T merger, Qwest stated that rather than simply listing competing CLECs, it is: "important to identify" the "scope of the services" they provide. "It is not enough for the parties simply to list CLEC names without reference to their competitive significance. The financial strength of these CLECs, and their ability to expand to serve new markets, also would be relevant."[39]

Moreover, the Applicants' very limited analysis seems to proceed on the assumption that if a CLEC reported having even one subscriber in a zip code as of June 30, 2008, that CLEC is a competitive option for all customers in the zip code.[40] That analysis is flawed for several reasons. First, a CLEC serving one customer in one building in a zip code may not be able to

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[37] Application at 22-34.

[38] *Id.* at 32.

[39] Petition to Deny of Qwest Communications Int'l, Inc., WC Docket No. 05-65, at 23-24 (filed Apr. 25, 2005).

[40] Application at 24-28.

serve customers in another building in the zip code. Second, a CLEC serving residential customers may not offer service to business customers, and vice-versa. Third, the two-year old data may include CLECs that are no longer serving any part of the zip code.

Before approving the SBC/AT&T, Verizon/MCI, and AT&T/BellSouth mergers, the Commission relied upon calculations of Herfindahl-Hirschman Indices computed by Staff, based on data submitted by the applicants,[41] as well as on voluntary commitments designed to ensure the maintenance of competition. The Commission cannot obtain a similar assurance of absence of anti-competitive effects here based on the very sparse data provided by Applicants, and absent any pro-competitive commitments offered by Applicants.

IV. THE PROPOSED MERGER WOULD CAUSE SIGNIFICANT HARMS

A. The Proposed Merger Would Result in All of the Harms Identified by the Commission in the SBC/Ameritech and Bell Atlantic/GTE Merger Orders

In its orders approving, with conditions, the SBC/Ameritech and Bell Atlantic/GTE mergers, the Commission identified a number of harms to the public interest and to competition specifically; it found that these harms would have been fatal to the merger applications but for an extensive list of merger conditions that offset those harms so that the transaction as a whole could be found to be in the public interest.[42] Specifically, the Commission found that the SBC/Ameritech merger threatened to harm consumers of telecommunications services in three distinct, but interrelated, ways.

1) The merger will remove one of the most significant potential participants in each of the applicants' local telecommunications markets, for mass market and enterprise customers.

[41] *See SBC/AT&T Merger Order*, ¶¶ 65-77; *Verizon/MCI Merger Order*, ¶¶ 65-78; *AT&T/BellSouth Merger Order*, ¶¶ 75-80.

[42] *See SBC/Ameritech Merger Order*, ¶¶ 347-349; *Bell Atlantic/GTE Merger Order*, ¶¶ 245-247.

2) The merger will substantially reduce the Commission's ability to implement the market-opening requirements of the 1996 Act by comparative practice oversight methods which, contrary to the deregulatory, competitive purpose of the 1996 Act, would, in turn, increase the duration of the entrenched firms' market power and raise the costs of regulating them.

3) The merger will increase the incentive and ability of the merged entity to discriminate against its rivals, particularly with respect to the provision of advanced telecommunications services, which would likely frustrate the Commission's ability to foster advanced services as it is directed to do by the 1996 Act.[43]

The proposed merger between Qwest and CenturyLink will also result in these identified harms. Indeed, because of the increased concentration in the industry since the conditioned approval of the SBC/Ameritech and Bell Atlantic/GTE mergers, along with the subsequent mergers of AT&T/SBC, Verizon/MCI and AT&T/BellSouth, these harms will be more severe and comprehensive if this merger is approved. Similar, or more comprehensive, conditions are therefore warranted.

1. The Merger Will Remove One of the Last Few Remaining Most Significant Potential Participants Within Each Company's Region, for Residential and Business Customers

In the *SBC/Ameritech Merger Order*, the Commission found that the merger between SBC and Ameritech would remove from each of the SBC and Ameritech regions one of the most significant potential participants in local telecommunications mass markets within each region.[44] The Commission was nevertheless willing to allow this reduction, but only subject to the imposition of a number of stringent conditions, intended to redress the competitive harm that would result from this reduction. At the time, the Commission expressed reservations about any

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[43] *SBC/Ameritech Merger Order*, ¶ 5. The *Bell Atlantic/GTE Merger Order* identified similar public interest harms with the BA/GTE merger. *See Bell Atlantic/GTE Merger Order*, ¶ 5.

[44] *SBC/Ameritech Merger Order*, ¶ 56.

further mergers, expressly stating that the burdens on future major LEC merger applicants would be "further escalat[ed]."[45]

Since the *SBC/Ameritech Merger Order*, the number of major LECs who are potential entrants to offer residential and business services in Qwest's and CenturyLink's region has decreased further, with the mergers of Bell Atlantic and GTE and the merger of AT&T and BellSouth. Moreover, the two largest interexchange carriers, AT&T and MCI, which were not only potential competitors in Qwest's and CenturyLink's regions for local services, but were actual competitors there, have been swallowed up by major ILECs, further reducing potential or actual significant competitors of residential and business services in the Qwest and CenturyLink regions.[46]

Thus, the harm of diminished potential competition posed by the instant proposed merger is more severe than that posed by the SBC/Ameritech and Bell Atlantic/GTE mergers. The Applicants allege that the Commission need not worry about these harms because, they say, "this merger will in no way reduce actual or potential competition."[47] But this assertion does not overcome the fundamental loss of one of a small number of significant potential and/or actual competitors in the Qwest and CenturyLink territories.

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[45] *Id.* ¶ 362.

[46] In past merger orders, the Commission performed an analysis of the competitive effects of the merger on mass market and enterprise markets. *See, e.g., SBC/Ameritech Merger Order*, ¶¶ 77 & 89; *AT&T/BellSouth Merger Order*, ¶¶ 88 & 62. However, because very small business customers demand different services or face different market conditions than residential customers, residential and business retail product markets should be examined separately. Stated differently, the Commission should perform an analysis of the competitive effects of this merger on the residential and business markets (rather than one that looks at the mass market and enterprise market).

[47] Application at 23.

First, the claim that the merger will not reduce actual or potential competition is unpersuasive. In prior merger orders, the Commission articulated "the various capabilities it considers in identifying the most significant potential competitors in local exchange and exchange access markets."[48] The Commission explained that

> Those capabilities include whether the firm: (1) has the operational ability to provide local telephone service (*i.e.*, know how, and operational infrastructure, including sales, marketing, customer service, billing and network management); (2) could quickly acquire a critical mass of customers; (3) has brand name recognition, a reputation for providing high quality and reliable service, an existing customer base, or the financial resources to get these assets; and (4) possesses some significant unique advantages, such as a cellular presence in the relevant market.[49]

Clearly, within their respective regions, both Qwest and CenturyLink tout that they "are leading voice and broadband service providers, with a commitment to local consumers."[50] Moreover, as discussed below, they both trumpet that they are "national" providers. Thus, they both have the ability and resources to offer services in each other's markets, as reflected by the fact that they have already done so. As the Commission aptly noted in the SBC/Ameritech context:

> As incumbent LECs, each firm is one of only a few potential entrants with the necessary systems, such as billing and operations support, required to provide local exchange services to residential and small business customers on a large scale. They also bring particular expertise to the process of negotiating and arbitrating interconnection agreements between incumbent and competitive LECs. In adjacent markets, each Applicant has an array of nearby switches that can be used to provide local exchange services in the other's traditional operating territories.[51]

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[48] *SBC/Ameritech Merger Order*, ¶ 73 (footnote omitted).

[49] *Id.* (footnote omitted).

[50] Application at 19.

[51] *SBC/Ameritech Merger Order*, ¶ 56.

This is also true of Qwest and CenturyLink, especially since they have over two hundred adjacent exchanges[52] and admit that that they sell wireline services in each other's territories.[53] Moreover, since Qwest resells Verizon's wireless services,[54] "it also has a base of customers to whom it can offer wireline local exchange services, potentially bundled with …[wireless] and other offerings."[55] Finally, in both adjacent and Qwest's wireless out-of-region markets, Applicants "have brand recognition…that would provide a strong and often unique advantage in providing competitive wireline services."[56]

Qwest's brand recognition is exceptionally strong. Qwest boasts that "Customers coast-to-coast turn to Qwest's industry-leading national fiber-optic network and world-class customer service to meet their communications and entertainment needs."[57] For residential customers, Qwest proclaims that it "offers a new generation of fiber-optic Internet service, high-speed Internet solutions, as well as digital home phone, wireless service available through Verizon Wireless, and DIRECTV® service."[58] It further touts that it "Fortune 500 companies choose Qwest Business to deliver a full suite of network, data and voice services for small businesses, large businesses, government agencies and wholesale customers" and that it "participates in

[52] *See* Application, Exhibit 5.

[53] CenturyLink acknowledges that it has facilities, albeit limited, in Qwest's region. *See* Application at Declaration of Puckett, ¶ 2. Qwest also acknowledges that it markets it services nationwide that it is possible "that, within Qwest's 14-state region, Qwest has built facilities to serve individual customers within CenturyLink territory." Application at 23 n.36.

[54] Application at 35; *see also* http://www.dslreports.com/shownews/Qwest-Dumps-Sprint-Will-Resell-Verizon-Wireless-94168.

[55] *See SBC/Ameritech Merger Order*, ¶ 56.

[56] *See Id.*

[57] http://news.qwest.com/company (last visited July 11, 2010).

[58] *Id*.

Networx, the largest communications services contract in the world, and is recognized as a leader in the network services market by leading technology analyst firms."[59]

CenturyLink has an exceptional brand recognition as well. It trumpets that it is "a leading provider of high-quality broadband, entertainment and voice services over its advanced communications networks to consumers and businesses in 33 states" and that it "is included among the Fortune 500 list of America's largest corporations."[60] It proclaims that it is the "fourth largest local exchange telephone company in the United States (based on access lines), with more than 20,000 employees in 33 states serving approximately: 7 million access lines, 2.2 million broadband customers, 553,000 video subscribers."[61] CenturyLink promotes itself as having a "national network" and able to offer "Voice and Data Solutions for every business."[62] Thus, Qwest is an actual and potential strong competitor in CenturyLink's region and vice versa.[63]

Applicants are currently actual and potential competitors of each other for residential services. In Minneapolis and Puget Sound/Gray's Harbor, Applicants admits that they compete against each other in the residential market.[64] As to the hundreds of adjacent territories, Applicants contend that prior to the merger, however, they did not have business plans to market

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[59] *Id*.

[60] http://ir.centurylink.com/phoenix.zhtml?c=112635&p=irol-IRHome (last visited July 11, 2010).

[61] http://www.centurylink.com/Pages/AboutUs/CompanyInformation/CompanyStats/ (last visited July 11,2010).

[62] https://www.centurylink.com/business/index2.jsp??invalid (last visited July 11, 2010).

[63] CenturyLink acknowledges that it has facilities, albeit limited, in Qwest's region. *See* Application at Puckett Declaration, ¶ 3. Qwest also acknowledges that it markets it services nationwide that it is possible "that, within Qwest's 14-state region, Qwest has built facilities to serve individual customers within CenturyLink territory." Application at 23 n.36.

[64] Applicants do not suggest otherwise. *See* Application at 24-25.

services to residential consumers in each other's incumbent local exchange areas that are adjacent to each other's markets where they are incumbent local exchange carriers.[65] This statement in itself does not mean that the Applicants are not potential competitors of each other with respect to residential services in these areas. In the *SBC/Ameritech Merger Order*, the Commission stated that "the lack of entry plans does not eliminate a firm from being considered a significant market participant; rather, we consider whether the firm has the capabilities, and is likely to have the incentive, to become a significant market participant soon."[66] As discussed above, there is no question that the Applicants have the capabilities,[67] especially in their adjacent regions, to be significant potential competitors of each other.

Applicants are also actual and potential competitors of each other for business services. Applicants attempt to avoid this conclusion by asserting that they "have focused on different segments of the business market."[68] But on the face of the Application, this is untrue. The Application states that Qwest offers "a wide range of communications services to all sizes of business customers, including many Fortune 500 companies, on a national and global scale", whereas "CenturyLink by contrast has focused on in-region business, with heavier emphasis on small and medium-sized business with local and regional needs."[69] These statements show that both CenturyLink and Qwest serve small and medium-sized business customers in CenturyLink's region. Applicants contend that CenturyLink "is not well positioned as Qwest to compete for the provision of a full suite of services to large business customers with widely

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[65] *See* Application, Puckett Declaration ¶ 3 & Taylor Declaration ¶ 2.

[66] *SBC/Ameritech Merger Order*, ¶ 75.

[67] *See, e.g.,* Application at 3-4, 8-10, & Puckett Declaration , ¶ 2.

[68] Application at 32.

[69] *Id*.

dispersed operations."[70] These arguments are belied by CenturyLink's own website marketing, which states that CenturyLink has "data, Internet, and telephone solutions" for "your business, large or small" and can offer "Voice and Data Solutions for every business."[71]

Each Applicant's marketing stresses its ability to serve business users nationwide. Thus, it bears emphasizing that Applicants are not merely a potential but *actual* competitors of each other with respect to business services and because of the strength of their brands and their extensive resources can only be expected to grow rapidly as a competitor of each other – unless that is, the competition between them is eliminated entirely by the closing of this merger. Consequently, this merger will result in potential harmful effects on horizontal competition.[72]

In light of this fundamental fact, Applicants' attempt to suggest that the Commission need not worry because retail business customers are "sophisticated" is specious.[73] Retail business customers, sophisticated as they may be, can only take advantage of such choices as they have, and such choices are rapidly dwindling. At the time of the SBC/Ameritech merger, the Commission expressed the hope that competition in the market for larger business customers would not be unduly harmed by that merger because of the larger number of competitive choices

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[70] *Id.*

[71] *See* https://www.centurylink.com/business/index2.jsp??invalid (last visited July 11, 2010).

[72] "A transaction is said to be horizontal when the parties to the transaction sell products that are in the same relevant product and geographic markets." *Verizon/Frontier Merger Order*, at n.51 (citing *AT&T/BellSouth Merger Order*, n.82.). "Firms not currently selling in the market that have committed to enter in the near future, or that would very likely sell in the market rapidly with direct competitive impact in the event of a small increase in the market price, would also be considered market participants for this purpose." *Verizon/Frontier Merger Order*, at n.51.

[73] Application at 32.

available to larger business customers than to residential customers.[74] But even if the Commission was right at that time, the landscape is very different today.

First, three more of the major competitive alternatives then available to larger business customers for all or portions of their needs – AT&T, MCI and GTE – have been swallowed up. Second, by the Applicants' own reckoning, only those competitors with nationwide service offerings are true players in the business space because of the widely dispersed locations and needs of the large business customers, and thus the many niche and regional players that seem to have reassured the Commission several years ago do not pose a significant competitive threat in this space. Third, the intermodal competition cited by Applicants as competitive alternatives in the retail business market is too limited in scope to deserve substantial weight in this analysis. For example, it is well known that cable voice and modem service is not ubiquitous, nor does it offer the same quality of service levels required by business customers and wireless cannot meet business customers' needs for data services. And fourth, many of the smaller competitors that undoubtedly underlaid the Commission's analysis several years ago have themselves either been swallowed up or exited the market.

Of particular note is the Applicants' insistence that CenturyLink must be allowed to merge with Qwest because it is "not as well positioned as Qwest is to compete for the provision of a full suite of services to large business customers with widely dispersed operations,"[75] while at the same time asserting that entities such as "interexchange carriers, CLECs, cable companies, foreign companies, systems integrators, and equipment vendors"[76] are formidable threats, notwithstanding their obvious lack of ubiquitous facilities. If Applicants' analysis is correct,

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[74] *See SBC/Ameritech Merger Order*, at 34.

[75] Application at 32.

[76] *Id*. at 33.

there is nothing to stop CenturyLink from competing by acting as (or acquiring) a systems integrator to better compete with Qwest. And indeed, that seems to be what CenturyLink is already doing to some extent. At bottom, despite the Applicants' effort to suggest otherwise, they are actual and potential competitors of each other.

2. The Merger Will Decrease Regulators', Competitors' and Customers' Ability to Use Comparative Practices and Rate Benchmarking to Evaluate Carriers' Practices and Proposals, and Will Thereby Increase the Duration of the Entrenched Firms' Market Power, Raise the Costs of Regulating Them and Reduce the Competitiveness of the Marketplace

In the *SBC/Ameritech Merger Order*,[77] the Commission also found that:

> [T]he proposed merger's elimination of Ameritech as an independent major incumbent LEC will significantly impede the ability of this Commission, state regulators and competitors to use comparative practices analyses to discover beneficial, pro-competitive approaches to open telecommunications markets to competition and to promote rapid deployment of advanced services. More specifically, the loss of Ameritech as an independent source of strategic decisions and experimentation, and the increased incentive for the merged entity to reduce autonomy at the local operating company level as a result of the merger, would severely restrict the diversity that regulators and competitors otherwise could observe and, where pro-competitive, endorse. By further reducing the number of major incumbent LECs, the merger also increases the risk that the remaining firms will collude, either explicitly or tacitly, to conceal information and thereby hinder regulators' and competitors' benchmarking efforts. We therefore conclude that the proposed merger of SBC and Ameritech would impede the ability of regulators and competitors to make effective benchmark comparisons, which would force more intrusive, more costly, and less effective regulatory measures contrary to the 1996 Act's deregulatory aims and the interests of both the regulated firms and taxpayers. The loss of this more efficient method of oversight can only serve to further entrench the large incumbent LEC's substantial market power.[78]

These same harms that the Commission found would result from an unconditioned SBC/Ameritech merger will also result from the proposed merger between Qwest and

[77] *SBC/Ameritech Merger Order*, ¶ 104.

[78] *Id.*; *see also Bell Atlantic/GTE Merger Order*, ¶ 130.

CenturyLink, and will in fact be more significant. If the Applicants are allowed to merge, there would be a loss of "an independent source of strategic decisions and experimentation."[79] This loss is even more grievous than the loss of Ameritech, since it comes at a time when there are significantly fewer points of comparison than there were at the time of the SBC/Ameritech merger. Ameritech, GTE, BellSouth, AT&T, and MCI have all disappeared as independent points of comparison as the result of mergers.[80]

The Commission foresaw several consequences from the loss of comparators for comparative practices benchmarking. First, regulators would see the weakening of one of their most important tools for keeping the entrenched carriers honest and to "promote the rapid deployment of advanced services."[81] The proposed Qwest/CenturyLink merger would erode further the ability of regulators to monitor adequately the practices of the incumbents for purposes of adopting pro-competitive approaches to regulation.

In addition, and at least as important today, the Commission noted that not just regulators, but "competitors" as well, use comparative benchmarking.[82] Given that arbitration of interconnection agreements has nearly come to a halt after the disappearance of AT&T and MCI as independent CLECs, competitors need such benchmarking even more today, to ensure that the benefits of what is left of competition flows through to the marketplace.

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[79] *See SBC/Ameritech Merger Order*, ¶ 104.

[80] The dwindling number of small ILECs and CLECs cannot substitute for this loss, as the Commission expressly found in the *SBC/Ameritech Merger Order*, observing: "Large incumbent LECs differ greatly from smaller incumbent LECs, competitive LECs and foreign LECs in regulatory treatment, structure and operation." *SBC/Ameritech Merger Order*, ¶ 58*; see also id.* ¶¶ 159-185.

[81] *SBC/Ameritech Merger Order*, ¶ 104; *see also id.* ¶¶ 130-139 (explaining the value of benchmarking for federal and state regulators).

[82] *SBC/Ameritech Merger Order*, ¶ 140.

There is one additional area – not dwelled upon by the Commission in the *SBC/Ameritech Merger Order* but important nevertheless – in which benchmarking plays an important part in diffusing competition through the market and leveraging its effects. This occurs when retail customers, especially larger business customers, engage in benchmarking. Such customers frequently benchmark rates and practices at several stages. First, during an RFP (request for proposal) or other formal bidding process, customers can benchmark carrier proposals not only against one another but against other deals that are present in the marketplace, and which must, when not tariffed, be made public by posting on the carriers' websites. Second, customers frequently benchmark at the time of renegotiation of existing agreements, either in lieu of a rebid at the time of expiration or as a midcourse mechanism for insuring that prices, terms and quality of service remain competitive during a long term agreement. This mechanism, when used by business customers, helps to assure that market signals as to price and service quality diffuse rapidly through the market. The popularity of this approach is attested to by the large number of firms performing such services for business users.[83] Like regulators and competitors, customers can use benchmarking to good effect even between carriers who do not directly compete (as when they serve different regions), since their practices are nevertheless comparable for benchmarking purposes, and even their rates serve as useful guidelines for what is competitive. Needless to say, however, the continuing loss of potential comparators substantially diminishes the benefit of benchmarking for customers as well.

[83] *See, e.g.*, Best Practices, LLC, http://www.best-in-class.com/; Customer Service Benchmarking Association, http://csbenchmarking.com/; Bain & Company, http://www.bain.com/management_tools/tools_benchmarking.asp?groupcode=2; The Benchmarking Company, http://www.benchmarkingco.com/; APEX Analytix®, http://www.apexanalytix.com/accounts-payable-best-practices.aspx. (all last visited July 11, 2010).

The Commission also found that a related, but distinct, harm to benchmarking would result from the SBC/Ameritech merger: it would increase the likelihood that the remaining major ILECs could successfully "collude, either explicitly or tacitly, to conceal information and thereby hinder regulators' and competitors' benchmarking efforts."[84] This would have several dire effects:

> The proposed merger, by reducing to *five* the number of major incumbent LECs, also would increase the incentive and ability of the remaining incumbents to coordinate their behavior, either explicitly or implicitly, to impede benchmarking and resist market-opening measures. As an initial matter, by merging Ameritech into SBC, the merger reduces by one the number of independent holding companies whose behavior must be coordinated, which simplifies the process of coordination. Coordination requires that the incentives of all parties are aligned, and reducing the number of companies reduces the number of incentives that must be aligned.
>
> Reducing the number of firms also increases each firm's incentive to coordinate its behavior to undermine regulatory processes. As we have mentioned, SBC will grow larger as a result of the merger, and therefore stands to sustain a larger loss as the result of any comparative practices analysis that constrains its behavior. This gives the merged firm greater incentive to enter into tacit agreement with the remaining firms to convey minimal information to regulators and/or competitors and to eliminate outlying policies and practices that could become industry benchmarks. Moreover, the merger will create a demonstrably large incumbent LEC that can act as an industry leader for collusive purposes.
>
> As a result of Ameritech's merger with SBC, the other major incumbent LECs also will have more incentive to cooperate in attempts to impede comparative practices analysis. Cooperative ventures, either explicit or implicit, involve the risk that one or more parties will deviate from the cooperative behavior, thereby spoiling the venture. With the cooperation of fewer firms necessary, the merger reduces the risk that a venture will fail, which translates into a lower risk for each firm from participating in the venture. This reduction in risk increases a firm's incentive to cooperate. By reducing the number of major incumbent LEC benchmark firms to five, with each firm facing more incentive to cooperate and little unilateral incentive to break an agreement to impede benchmarking, the proposed merger will facilitate any attempts, especially implicit attempts, to coordinate behavior to conceal forms of competitive deterrence from regulators and competitors. The merger of SBC and Ameritech therefore increases the incentive and abilities of the merged firm and other incumbent LECs to cooperate

[84] *SBC/Ameritech Merger Order,* ¶ 104.

> in becoming less effective benchmarks for regulators and competitors seeking to promote competitive entry and rapid deployment of advanced services.[85]

The Commission was rightly concerned about the harmful effects of possible collusion in a market after the SBC/Ameritech merger, and should be far more concerned in today's market, which would have still fewer major ILECs after the proposed merger. As the Commission stressed in the *SBC/Ameritech Merger Order*,[86] the smaller the number of participants, the more likely collusion can be maintained and can succeed. The Commission warned that, even with the reduction to five major ILECs, the increased ability of the ILECs to collude would seriously endanger the ability of regulators and competitors to use benchmarking effectively:

> Because each successive reduction in the number of benchmarks will reduce the utility of comparative practices analyses, there will be some point at which further reduction in benchmark firms renders such comparisons ineffective. As noted above, in the *Horizontal Merger* Guidelines, DOJ set a threshold of market concentration according to an 1800 HHI, or the equivalent of six equally-sized firms. *See Horizontal Merger Guidelines*, at 16 ("Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise."). In such a market, a merger that reduces the number of competing firms from six to five is therefore likely to be challenged as raising serious concern regarding unilateral and coordinated effects. Analogously, using a market which consists not of competing firms but of benchmark firms, reducing the number of benchmark firms from six to five is likely to raise concern with respect to coordinated efforts to defeat benchmarking, which, as noted above, are more likely to succeed here than in competitive markets where each firm faces potential gain from unilateral deviation.[87]

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[85] *SBC/Ameritech Merger Order*, ¶¶ 156-158 (emphasis added; footnotes omitted).

[86] *Id*. ¶ 121 & n.237 (citing F. M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance* 277-315 (3rd Ed., 1990); A. Jacquemin and M. Slade, "Cartels, Collusion, and Horizontal Merger," published in R. Schmalensee and R.D. Willig, *Handbook of Industrial Organization*, Vol. 1 (1989)).

[87] *SBC/Ameritech Merger Order*, at n.240 .

Joint Commenters respectfully submit that prior mergers have resulted in the market reaching the very "point at which further reduction in benchmark firms renders such comparisons ineffective,"[88] as the Commission warned.

In short, this new loss of potential benchmarking comparators will only exacerbate further the consequences that followed from the SBC/Ameritech and other mergers, just as the Commission had predicted.[89]

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[88] See *id.*

[89] In the *AT&T/BellSouth Merger Order,* the FCC concluded that "benchmarking does not represent as useful or important a regulatory tool as the Commission previously believed." *AT&T/BellSouth Merger Order*, ¶ 189. The FCC agreed with AT&T and BellSouth that "measuring a company's performance over time is the most appropriate way to detect and evaluate reversion to discriminatory practices." *Id*. It found that "[s]ince 2000, BOCs have been subjected to comprehensive performance plans containing thousands of metrics and numerous self-executing remedies to measure the success of the competition-opening provisions of the 1996 Act" and that that "[t]he performance of other companies is not germane to the question of whether the performance of the company under scrutiny is improving, deteriorating, or staying the same." *Id*. This finding was flatly wrong. Performance assurance plans or service level agreements that measure the wholesale performance of a company do not substitute for benchmarking that compares major ILEC business practices with CLECs against the practices of the other major ILECs. The Commission's rationale entirely and improperly ignored the Commission's eighty-four paragraphs in the *SBC/Ameritech Merger Order*, ¶¶ 101-185 discussing benchmarking and its importance in discovering "beneficial, pro-competitive approaches to open telecommunications markets to competition and to promote rapid deployment of advanced services." *SBC/Ameritech Merger Order*, ¶ 104. It is these pro-competitive approaches that are used to demonstrate that another ILEC's business practices, rates, terms and conditions are unreasonable and need to evolve to become pro-competitive. Performance assurance plans are no substitute for this.

Moreover, the Commission's prior reliance on performance assurance plans is, to a significant degree, inapplicable here. In much of its region, CenturyLink is not subject to any performance assurance plan. Nor do the performance assurance plans to which Applicants are subject apply to all the services offered by Applicants (rather, where applicable, they apply only to select services). If the Commission is going to rely on the performance assurance plans as a substitute for benchmarking, it must ensure that the combined company is subject to performance assurance plans throughout its region and that performance assurance plans cover all the services offered at wholesale by the Applicants.

In addition, in the *AT&T/BellSouth Merger Order*, the Commission noted that, "in the years since the Commission issued the SBC/Ameritech and Bell Atlantic/GTE merger orders, the Commission has rarely used benchmarking in either rulemaking or enforcement proceedings."

3. The Merger Will Increase the Incentive and Ability of the Merged Entity to Discriminate Against Its Rivals, and Thereby Harm Competition and Consumers in the Long Distance and Local Exchange Markets

In the *SBC/Ameritech Merger Order,* another key concern identified by the Commission, in holding that the merger should be disapproved but for the conditions adopted, was that the SBC/Ameritech merger would increase the ability and incentive of the combined entities, as well as the other remaining ILECs to "discriminate against competitors in the provision of advanced services, interexchange services, and circuit-switched local exchange services . . . ."[90] In particular, "[i]n the retail market for interexchange services, incumbent LECs with section 271 authority to offer interexchange services to in-region customers will have an incentive to discriminate against the termination of calls in its region by independent IXCs in order to induce callers at the originating end to choose the incumbent LEC as the interexchange provider."[91] The FCC explained that "[t]he combined entity, controlling a larger area, terminates calls from a greater number of in-region customers and therefore has more incentive to engage in such discrimination."[92]

Such discrimination, the Commission emphasized, violates the "fundamental postulate"[93] of U.S. telecommunications law, as expressed originally in the MFJ governing the divestiture of

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Id. Again the Commission's finding was flawed because the need for benchmarking is not limited to these types of proceedings. Rather, outside of a formal proceeding, as recognized by the Commission in the *SBC/Ameritech Merger Order*, benchmarking is also used by regulators (including state regulators) and by competitors in negotiating rates, terms and conditions of agreements or management practices with the major ILECs. *See, e.g.*, *SBC/Ameritech Merger Order*, ¶ 108 & ¶ 125. As discussed above, even retail end users engage in benchmarking. The Commission's dismissal of the value of benchmarking in the *AT&T/BellSouth Merger Order* was based on flawed logic that should not be followed here, especially given the Commission's fully articulated and logical recognition of significant importance of benchmarking in the *SBC/Ameritech* and *Bell Atlantic/GTE Merger Orders*.

[90] *SBC/Ameritech Merger Order*, ¶ 186 (footnotes omitted).

[91] *Id.* ¶ 196.

[92] *Id.*

[93] *Id.* ¶ 190.

AT&T and later in the 1996 Act. As the Commission observed: "This increased incentive to discriminate will result in a public interest harm, because it will adversely affect national competitors' provision of services in the new, combined region, and, as a further result, will harm consumers who ultimately will be forced to pay more for retail services, with reduced quality and choice."[94] The Commission's conclusions in this regard once again apply doubly to the instant proposed merger.

The Commission correctly recognized in the *SBC/Ameritech Merger Order* that the larger the combined entity, the more incentive it would have to discriminate because of gains from external effects. Put another way, since discrimination in one region has "spillover" effects in other regions, an ILEC with operations in both regions will reap benefits in both regions, and thus will have greater incentive to discriminate.[95] "Economies of scale and scope and network effects," the Commission reasoned, "imply that when incumbent LECs weaken a competitive service in one region, this weakens it in other regions as well."[96] It recognized that "the merger's big footprint will create more incentives for the merged entity to discriminate against competitors whose networks become more attractive with more 'on-net' customers."[97] The Commission explained, "the level of discrimination engaged in by the combined entity in each region within the combined territory would be greater than the sum of the level of discrimination engaged in by the two individual companies in their own, separate regions, absent the merger."[98]

The merger of the Applicants' service areas in this case will cause each to grow dramatically and as a result, Applicants incentive to discriminate will increase substantially. In addition to increasing the combined entity's *incentive* to discriminate, the merger would, if allowed to proceed, also dramatically increase the combined entity's *ability* to discriminate. As

[94] *Id.* ¶ 186.

[95] *See id.* ¶ 192.

[96] *Id.* ¶ 207.

[97] *Id.*

[98] *Id.* ¶ 193.

the Commission found in the *SBC/Ameritech Merger Order:*

> [t]he increased ability of the combined entity to discriminate, at least in the absence of stringent conditions, will result from: (1) the reduction in the number of benchmarks, making it more difficult for regulators to monitor and detect misconduct; (2) the ability of the combined entity to coordinate and rationalize the discriminatory conduct of the two companies (sharing 'worst practices'), making detection and proof of discrimination more difficult; and (3) the efficiencies (economies of scope) that result from being able to share strategies and resources while fighting similar regulatory battles in multiple state forums.[99]

And with the loss of much of the Commission's remaining benchmarking capability, the competitors' ability to prove the existence and extent of discrimination will be severely diminished as well.

With regard to the SBC/Ameritech merger, the Commission found that this heightened incentive and ability of the merged entity to discriminate would separately harm competition in advanced services,[100] long distance,[101] and local exchange services.[102] Competition in all three of these product markets would likewise be harmed by this merger, which would cover the areas where Applicants operate in 37 states.[103]

[99] *SBC/Ameritech Merger Order*, ¶ 209 (footnotes omitted).

[100] *See id*. ¶¶ 197-211.

[101] *See id*. ¶¶ 212-230.

[102] *See id.* ¶¶ 236-247.

[103] In the *AT&T/BellSouth Merger Order*, the FCC concluded that this "'big footprint' theory is theoretically valid" but then found itself not persuaded that the "general arguments presented by commenters justify the imposition of burdensome conditions in this proceeding." *AT&T/BellSouth Merger Order*, ¶ 185. The Commission explained that "commenters present no rigorous theoretical model that generates even a rough estimate of the merger's incremental impact on AT&T's incentive to discriminate" and that "commenters present no convincing empirical evidence showing that such mergers led to increased postmerger discrimination against rivals." *Id*. The Commission further stated that "[c]ommenters fail to address how and whether the merged entity's incentives are affected by the fact that AT&T, through its out-of-region operations, should already be internalizing some of the externalities of any discriminatory activity." *Id*. The Commission's finding was erroneous; commenters do not have the burden in this proceeding — the Applicants do. If the Applicants cannot produce a preponderance of evidence that rebuts and debunks the "big footprint" theory as applied here, the Commission

V. THE APPLICANTS FAIL TO SHOW DEMONSTRABLE AND VERIFIABLE PUBLIC BENEFITS THAT WOULD BE PURSUED BUT FOR THE MERGER

The Commission's analytical framework for evaluating the Applicants' claims of public interest benefits is well settled. As a threshold matter, the Applicants clearly bear the burden of showing that any claimed public interest benefits outweigh the potential harms resulting from the merger.[104] The Applicants then must demonstrate that any claimed public interest benefit is "merger-specific," meaning that it is "likely to be accomplished as a result of the merger but unlikely to be realized by other means."[105] The claim must also be "verifiable," with the burden on the Applicants "to provide sufficient evidence supporting each claimed benefit to enable the Commission to verify its likelihood and magnitude."[106] The Commission must "dismiss speculative benefit that it cannot verify."[107] Finally, with respect to cost savings, the Commission should only recognize savings in marginal cost because these savings are more likely to benefit the public in terms of lower prices.[108]

A. Applicants Fail to Show the Merger Will Prompt the Improvement and Expansion of Broadband Capability

1. Applicants Fail to Show that the Merger Will Result in Improved Access to High-Speed Internet Services

The Applicants' first claimed benefit is that the combination "will facilitate the

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must conclude the big footprint discrimination concerns will occur and either reject the merger or impose significant conditions on the merger. *See Frontier/Verizon Merger Order*, ¶ 44; *CenturyTel/Embarq Merger Order*, ¶ 33. Notably, this merger will result in a much larger merged company than either the Frontier/Verizon or the CenturyTel /Embarq mergers.

[104] *AT&T/BellSouth Merger Order*, ¶ 203.

[105] *CenturyTel/Embarq Merger Order*, ¶ 35 (citing *AT&T/BellSouth Merger Order*, ¶ 202).

[106] *CenturyTel/Embarq Merger Order,* ¶ 35; *AT&T/BellSouth Merger Order,* ¶ 202.

[107] *CenturyTel/Embarq Merger Order,* ¶ 35.

[108] *Id.*; *AT&T/BellSouth Merger Order,* ¶ 202.

deployment of broadband to more customers."[109] These claims are conclusory and lack any empirical or evidentiary support.[110] While the Applicants claim they will be able to introduce new or more robust broadband competition in many areas throughout the country, the Application is woefully lacking in any factual support for this claim. The Applicants do not explain how the combination enhances the competitiveness of their broadband service. The Applicants similarly fail to explain what factors will allow the combined company to provide broadband to customers that absent the merger, they would not serve, which is what is required to satisfy the merger-specific criteria. Nor does the Application show how the combination of the companies will make competition for broadband more "robust." These deficiencies in "verifiable" support alone require the Commission to reject Applicants' contention that the merger will facilitate the deployment of broadband to more customers.

Nor is it clear that the Applicants could muster the evidence necessary to show a merger specific benefit of increased broadband competition. As shown below, each of the merging parties alone has already committed to make substantial investments in its broadband services to increase the bandwidth available to consumers and to bring broadband to previously unserved customers. These preexisting commitments make it impossible for the Commission to find that the Applicants' claimed broadband benefit is "merger-specific."

CenturyLink, for example, in order to obtain the Commission's approval of the merger between CenturyTel and Embarq, has already committed to "offer retail broadband internet access to 100 percent of the merged company's retail single-line residential and single lines

[109] Application at 13.

[110] Unlike the CenturyTel/Embarq merger, here Applicants do not even offer a declaration to support their claims of increased broadband deployment.

business access lines within three years."[111] At least 90% of these lines will have 768 Kbps broadband within that three year period. *Id*. Further, CenturyLink committed that it would increase broadband capacity as follows: 1.5 Mbps to 87% retail single-line residential and single lines business access lines within two years, and 3 Mbps to 75% of retail single-line residential and single lines business access lines within one year, increasing to 78% by year two and 80% by year three. *Id*. At the time of the CenturyTel/Embarq application, CenturyLink provided first generation speed broadband to 87% of their geographic territory. *Id*. The Commission found that these commitments were "substantial[]." The Applicants in this proceeding have not even asserted, much less shown, that the combined company will go beyond these existing substantial broadband commitments if the merger is approved.[112]

According to the Applicants, Qwest's broadband service already covers 86 percent of living units in Qwest's territory; 14 million of those units can obtain 1.5 Mbps speeds and 8 million of those 14 million can obtain 5 Mbps or greater. Consistent with the Application's lack of detail, the Applicants fail to disclose Qwest's considerable investment that is made, independent of the merger, to upgrade broadband speeds to its customers. According to publicly filed data, however, Qwest "has been investing significant sums to increase its broadband capability through its FTTN [Fiber to the Node] initiative, which allows Qwest to offer broadband services at significantly higher speeds up to 40 Mbps downstream and 20 Mbps

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[111] *Century/Embarq Merger Order,* ¶ 40.

[112] Further, the CenturyTel/Embarq merger application did not include similar commitments. The broadband commitments the Commission found to be in the public interest were last minute additions offered by the applicants to convince the Commission that its merger should be approved. *See* Letter from Gregory S. Vogt, Counsel for CenturyTel, Inc., and Samuel L. Feder, Counsel for Embarq Corporation, *et al.,* to Marlene H. Dortch, Secretary, FCC, WC Docket No. 08-238, at 5-6 (filed June 22, 2009).

upstream."[113] The most recent results released by Qwest indicate that FTTN-based broadband is available to 3.8 million residential households, and Qwest added 64,000 customers using FTTN broadband in the first quarter of 2010.[114] Qwest's FTTN-based customers now represent 17% of the company's broadband customer base.[115] According to analysts, Qwest plans to increase the FTTN foot print to another 1 million homes in 2010.[116] Qwest has asserted in public filings that it already operates from the premise that "increase[ing] connection speed is competitively important."[117]

Given each company's separate pre-existing plans for increasing its respective investment in broadband by expanding the availability of broadband and increase the available speeds for such service, and the complete absence of any hard evidence or even promises regarding further increases that will result only if the merger is approved, the Commission cannot accept the Applicants' claim that the deployment of broadband is a merger-specific public interest benefit.

2. Applicants Fail to Show the Merger Will Increase Competition for MultiChannel Video Services

The Applicants' showing concerning alleged benefits in the provision of video programming consists to a large extent of a discussion of the generalized benefits of competition in video programming.[118] For that reason alone this benefit does not satisfy the Commission's standard, as the Applicants fail to provide any verifiable support for their claims. While plausible at a theoretical level, the claimed video competition benefit could be achieved by Qwest's

[113] *See* Direct Testimony of Mark S. Reynolds, Qwest Corp, Docket UT-100820, ex. MSR-IT (Wash. U.T.C. May 21, 2010).

[114] *Id.* (citing Press Release, Qwest first Quarter 2010 earnings report, May 5, 2010).

[115] Raymond James, Qwest 1Q10 results, May 5, 2010.

[116] *Id.*

[117] Qwest 2009 Annual Report at 46.

[118] Application, p. 16.

provision of video programming even if it remains independent of CenturyLink. Therefore, the generalized benefits of video competition discussed in the application are not merger-specific.

Contrary to the Applicants' contention, the merger is not necessary to deploy IPTV in Qwest territory. As discussed in Section V.A.1, Qwest is rolling out a robust FTTN network that could support IPTV capability.[119] In fact, Qwest at one point had plans to launch IPTV over its FTTN network.[120] Qwest made public statements directly linking its FTTN upgrades to its plans for IPTV entry.[121] The Applicants admit that Qwest has "deployed cable headends" in Denver, Tempe, Omaha and Salt Lake City.[122] Further, Qwest has already obtained local franchises allowing it to operate a wireline video network in several markets.[123] In particular, in 2007 Qwest obtained a franchise from Portland, Oregon, indicating its plans to cover 50% of the market within six years and tying its FTTN upgrade to its planned IPTV entry.[124] Further, Qwest currently resells DIRECTV service and thus already competes in the video market. Although the combined company may well be able to bring IPTV to Qwest's customers, it also the case that Qwest can and would do so, even in the absence of the proposed merger, in light of the substantial investments it has already made. While the Applicants theorize that "developments over the past few years"[125] have streamlined the path towards improved the conditions for mass market video competition, none of those changes are specific to the proposed merger and would

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[119] *See* Direct Testimony of Mark S. Reynolds, Qwest Corp, Docket UT-100820, ex. MSR-IT (Wash U.T.C. May 21, 2010).

[120] Raymond McConville, Qwest delivers IPTV Confusion, Light Reading, Nov. 29, 2007 http://www.lightreading.com/document.asp?doc_id=139880.

[121] *Id.*

[122] Application at 15.

[123] Raymond McConville, Qwest delivers IPTV Confusion, Light Reading, Nov. 29, 2007.

[124] *Id.*

[125] Application at 16.

apply equally to Qwest standing alone. Therefore, the Applicants have not shown that provision of IPTV in the Qwest region is "merger-specific."

Nor does the Application provide persuasive evidence showing that the merger would speed deployment of IPTV in either Qwest or CenturyLink territory. CenturyLink's alleged head start in providing IPTV is insignificant because that experience is confined to three small test markets (Columbia, Missouri, Jefferson City, Missouri, and LaCrosse, Wisconsin).[126] These markets cannot be compared to the large metropolitan markets that Qwest serves in Phoenix, Minneapolis, Denver, Seattle, and Portland, and the Application fails to provide any explanation for the linkage.

Accordingly, there is no basis for the Commission to find that the merger would provide any benefits with respect to provision of multichannel video services.

3. Applicants Fail to Show the Merger Will Increase Competition for Services to Enterprise and Governmental Customers

The Applicants claim that the transaction will "give post-merger CenturyLink an enhanced position in the enterprise and government broadband markets."[127] It claims a public interest benefit because CenturyLink can "leverage Qwest's strength in providing complex communications services to large business and government entities,"[128] "offer customers more diverse routing options,"[129] and make CenturyLink a stronger competitor to other firms such AT&T, Verizon, Comcast and Cox.[130] Consistent with their overall approach, the Applicants continue the practice of making conclusory statements without providing the necessary

[126] *Id*. at 15.

[127] *Id*. at 18.

[128] *Id*.

[129] *Id*.

[130] *See Id*.

evidentiary support. The Application fails to include any details regarding the Applicants' current government contracts and provides no information about whether CenturyLink, Qwest or both are currently providing service to government buildings in CenturyLink territory. And none of the alleged benefits are merger-specific, as Qwest already competes vigorously in these markets.

The Applicants' arguments with respect to the enterprise market, that they need to merge to compete with larger firms, represent a classic pro-merger argument, which inevitably leads to more and more mergers until the market becomes a duopoly, which the FCC has recognized is not a desired result. As discussed in more detail in Section IV, this cycle of consolidation is harmful to the public interest and not a benefit because it reduces the number of current and future competitors and thus chips away at the market's ability to restrain anti-competitive practices.

Applicants' claims of benefits to the government further contradict more than a decade of federal government telecommunications procurement policy, as well as the government's determination to break up the old AT&T in 1983. Since the late 1980's, the government, acting as a purchaser of telecommunications services, has sought lower prices and greater network redundancy in telecommunications procurement (as do many non-governmental customers). Abandoning that policy to obtain service from fewer providers is not in the interest of American taxpayers, who, under the policy that Applicants propose be abandoned, have enjoyed remarkable cost savings in government telecommunications services while government use of telecommunications services has exploded.[131]

[131] *See* Federal Acquisition Service, Networx Program Update, Presentation of Fred Schobert, at slide 3, Jan. 3, 2007 available at

Since 1988 and the first FTS2000 contract, the federal government has wisely sought to obtain the benefits of telecommunications competition for government customers and American taxpayers. Thus, the government's telecommunications procurements are part of "the overall strategy to foster so-called, 'ruthless competition' for government telecommunications services."[132] For this reason, the government's procurement policy calls for multiple suppliers providing multiple and overlapping services so Federal agencies always receive the benefits of competition even after procurement is complete.[133] The proposed merger will by contrast decrease the number of available suppliers. For these reasons, the Commission may not conclude that the proposed merger would produce benefits to government or national security.

B. CenturyLink's Purported Assurance that It Will Continue, Post-Merger, to Focus on Local Consumers & Rural Communities is Not a Merger Specific Benefit

The Applicants argue that the public will benefit because they will "continue" to focus on serving rural communities.[134] Again, consistent with the sparse detail provided in their Application, the Applicants do not offer substance to support their claims that this is a public interest benefit. But even if the Applicants offered more detail, that would not minimize the reality that this promise is not a merger-specific benefit, as reflected in the operative verb used

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http://www.gsa.gov/graphics/fas/2007FASNetworxProgramUpdate_R2-z96-v_0Z5RDZ-i34K-pR.pdf (last visited July 12, 2010).

[132] *See* Press Rel., GSA Selects AT&T for Local Telecommunications in 3 Metro Areas Company to Provide Local Service in New York, Chicago, San Francisco, May 20, 1999, http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_BASIC&contentId=9519 (last visited July 12, 2010).

[133] *See* Statement of Stephen A. Perry, Administrator General Services Administration, Before the Committee on Government Reform U.S. House of Representatives, February 26, 2004 (Networx contract designed to "Leverage the volume of Federal government requirements to provide extraordinary value through low pricing;" "provide choices to agency customers in selecting from among multiple contractors … and leveraging the prices of multiple offerors.")

[134] Application at 19-20.

by Applicants: "**continue**." By definition, if the result of the merger is that Applicants will "continue" what they are doing prior to the merger, such "continuation" cannot be deemed a merger-specific benefit. Applicants do not allege that absent the merger they would abandon their current focus on local consumers and rural communities.

As the Application make clear, CenturyLink currently emphasizes service to its rural communities. CenturyTel did so before the Embarq acquisition,[135] and continues to do after that transaction closed.[136] Since this focus on local consumers and rural communities is already part of the CenturyLink company strategy, it cannot qualify as a benefit that it is "likely to be accomplished as a result of the merger but is unlikely to be realized by other means." It is already realized in CenturyLink territory. Nor can CenturyLink claim that its focus on rural communities will benefit consumers in Qwest's metropolitan markets such as Phoenix, Seattle and Denver, among others. The Commission need not credit any of the Application's claims that this is a public interest benefit.

C. Cost Savings/Synergies to the Applicants Are Not a Public Interest Benefit

The Applicants claim that cost saving synergies of approximately $575 million will be realized 3-5 years after closing.[137] A significant component of these 'synergies" "will be reduced corporate overhead, elimination of duplicate functions… and increased operational efficiencies."[138] By themselves, these are not, however, public interest benefits, especially since these "efficiencies" can be code words for layoffs. The Applicants include one sentence as to how the alleged savings will benefit consumers: "These operational synergies will result in

[135] Application, at 19.

[136] *See, e.g., id.* at 19-21.

[137] Application at 21.

[138] *Id.*

savings in fixed and marginal costs that will accrue to the benefit of consumers." Again, consistent with the Applicants' systematic failure to provide any meaningful support for their claims, this purported public interest benefit is not supported by a declaration, any facts, or any commitment to share the cost savings with retail or wholesale customers. In fact, depending on the source of synergies, such synergies may be harmful to the public interest. For example, if any portion of the $575 million in alleged synergies results from consolidating OSS systems to a less robust CenturyLink/Embarq OSS and eliminating the Qwest OSS, then that synergy will only accrue to the benefit of CenturyLink's shareholders and would be detrimental to competition and the public.

Applicants' claims regarding these "synergies" are insufficient to warrant a finding that alleged cost savings will benefit the public interest. Notably missing is any commitment to pass along the benefits of such cost savings to the public by redirecting cost savings to research and development for innovative new products and services or more directly through lower retail or wholesale prices. The cost savings would not benefit the public interest if the company were to pass through virtually all of any cost savings to its shareholders in the form of increased dividends or to use them to fund another acquisition. In addition, the Applicants do not propose any rate reductions for retail or wholesale customers. Given their monopoly market shares in most markets, and the fact that Applicants do not propose to share in any of the alleged savings from this merger with the much smaller competitors that they face, Applicants have no reason to reduce rates.

While CenturyTel and Embarq made similar representations about cost savings in their merger application, their representation was at least supported by a sworn declaration, which is noticeably absent here. In addition, these are different mergers. As explained elsewhere in these comments, Qwest's size and scope as well as its position as a Bell Operating Company requires that this merger be given more scrutiny than the Commission gave the CenturyTel/Embarq transaction.

The Commission is further barred from considering these purported synergies as a public interest benefit because they are speculative. The Applicants' claim that their projected cost savings will only accrue after 3-5 years[139] is fatal; the Commission has rejected claimed savings in such a time period as speculative.[140]

For these reasons, the Commission should find that absent conditions, the alleged cost savings do not constitute a public interest benefit.

VI. CONDITIONS ARE NECESSARY TO PRODUCE A BETTER BALANCING OF HARMS AND BENEFITS

As with prior mergers, pro-competitive conditions are required to offset the many anti-competitive aspects of the proposed merger.

A. Duration of Conditions

In the AT&T/BellSouth Merger Order, the AT&T proposed that conditions would last 3.5 years (42 months) from the merger closing date unless specified otherwise. The forty-two month period officially sunsetted on June 30, 2010; however, the competitive harms caused by the merger of AT&T and BellSouth have not ended and therefore the marketplace is harmed by the merger. For instance, while AT&T's operating companies filed tariffs reducing their Phase II tariff rates to price cap levels in compliance with the *AT&T/BellSouth Merger Order* Condition 6 relating to Special Access,[141] those operating companies added a statement in their tariffs that

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[139] Application at 21.

[140] *See Echostar/DirectTV Order*, ¶ 209.

[141] *See AT&T/BellSouth Merger Order*, at Appendix F, p. 151; *see also AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74,

prices in Phase II areas would rise to pre-merger levels as soon as the condition expired, which is what happened. As Sprint recently noted, as the result of the expiration of that merger condition, the AT&T ILECs "are increasing their interstate special access rates simply *because they can* - there are no competitive market forces sufficiently strong to prevent or limit the scheduled rate increases."[142] If AT&T were concerned about the impact of competitive entry, it would not have announced or implemented such price increases more than three years ago. The lesson learned is that a forty-two month duration is insufficient to counterbalance the very significant harms to competition caused by the merger, especially with respect to wholesale network and service inputs that are essential to retaining some semblance of competition in the small and medium business market.

Given the lesson learned, the merger conditions should last at least seven years. The Commission imposed a six-year term as a pre-condition to the closing of the proposed acquisition of Adelphia Cable.[143] The Adelphia Cable merger pales in comparison to harms associated with this merger and so it is appropriate to make the term of remedial conditions even longer than that transaction. One year longer is abundantly reasonable and justified. Moreover, a seven year duration is the minimum period necessary to create regulatory certainty. In the case of the 42 month long AT&T – Bell South merger conditions, AT&T engaged in regulatory and legal challenges that rendered useless some of the key merger conditions related to

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Memorandum Opinion and Order, 22 FCC Rcd 6285, at Appendix (2007) ("*AT&T/BellSouth Merger Order on Reconsideration*").

[142] *See* Letter from Charles W. McKee, Vice President, Government Affairs, Federal and State Regulatory, Sprint, to Marlene H. Dortch, Secretary, FCC, WC Docket 05-25 (filed June 28, 2010).

[143] *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203, Appendix B, ¶ 7 (rel. July 21, 2006).

interconnection agreement portability.[144] Interconnection agreements ordinarily are effective for three years and then must be renegotiated. A seven year period will provide for two full cycles of interconnection periods which is the minimum necessary for reasonable business planning.

A seven year period will additionally defer a steady stream of ILEC-driven litigation and regulatory backtracking that undermines competition. For example, the BOCs obtained all the broadband relief they said that they required under Section 251, but now through further forbearance petitions have been relentlessly seeking relief from Section 251(c)(3) unbundling obligations.[145] A seven year duration of conditions will preclude the Applicants from unsettling

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[144] *See, e.g., generally In the Matter of the Carrier-to-Carrier Complaint and Request for Expedited Ruling of Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp., and NPCR, Inc., Complainants, v. The Ohio Bell Telephone Company dba AT&T Ohio, Respondent*, *Relative to the Adoption of an Interconnection Agreement*, Case No. 07-1136-TP-CSS, Finding and Order, at 15 (Ohio P.U.C. Feb. 5, 2008), Entry on Rehearing, at 9 (Ohio P.U.C. Apr. 2, 2008); *Sprint Communications Company, L.P., Sprint Spectrum, L.P., Nextel West Corp., and NPCR, Inc., Complainants, v. Southwestern Bell Telephone Company, d/b/a AT&T Missouri, Respondent*, Case No. TC-2008-0182, Order Granting Motion to Dismiss (Mo. P.S.C. July 4, 2008).

[145] *See, e.g.,* Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, WC Docket No. 09-135 (filed Mar. 24, 2009); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado Metropolitan Statistical Area, WC Docket No. 07-97; Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Minneapolis-St. Paul, Minnesota Metropolitan Statistical Area, WC Docket No. 07-97; Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, WC Docket No. 07-97; Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle, Washington Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston Metropolitan Statistical Area, WC Docket No. 06-172 (filed Sept. 6, 2006); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the New York Metropolitan Statistical Area, WC Docket No. 06-172 (filed Sept. 6, 2006); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Philadelphia Metropolitan Statistical Area, WC Docket No. 06-172 (filed Sept. 6, 2006); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Pittsburgh Metropolitan Statistical Area, WC Docket No. 06-172 (filed Sept. 6, 2006); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47

business planning by filing forbearance petitions seeking unbundling relief that is inconsistent with the merger conditions imposed by the Commission

Because the record demonstrates that unqualified approval of the Qwest/CenturyLink merger would result in the loss of a critical existing and potential source of wholesale supply, it is vital that the conditions imposed on the proposed merger last for seven years to assure that reasonably priced unbundled facilities and special access services, along with offerings provisioned under commercial agreements, remain available from the Applicants.

In the alternative, Joint Commenters propose that the Commission require that the conditions last a minimum of 42 months, as provided in the *AT&T/BellSouth Merger Order*, and continue thereafter until the Applicants are granted Section 10 forbearance from the conditions. Under Section 10, the Commission is required to forbear from any regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that the telecommunications carrier's charges, practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance from applying such regulation is consistent with the public interest.[146] In making the determination as to whether forbearance is consistent with the public interest, the Commission must also consider "whether forbearance from enforcing the provision

U.S.C. § 160(c) in the Providence Metropolitan Statistical Area, WC Docket No. 06-172 (filed Sept. 6, 2006); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Virginia Beach Metropolitan Statistical Area, WC Docket No. 06-172 (filed Sept. 6, 2006); *Wireline Competition Bureau Seeks Comment on Remands of Verizon 6 MSA Forbearance Order and Qwest 4 MSA Forbearance Order, Pleading Cycle Established*, WC Docket Nos. 06-172, 07-97, Public Notice, 24 FCC Rcd 10881, DA 09-1835 (rel. Aug. 20, 2009).

[146] 47 U.S.C. § 160(a).

or regulation will promote competitive market conditions."[147] Section 10(a) permits forbearance only if all three elements of the forbearance criteria are satisfied.[148]

Because merger conditions are designed to offset the harms of the merger, they are effectively imposed to: (a) ensure that the Applicants' charges, practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (b) protect consumers; and (c) further the public interest and promote competitive market conditions. While the Section 10 standard, if met, is designed to relieve an applicant of regulatory obligations, the core factors considered under the three prong forbearance standard ironically support imposing regulatory obligations on the merger. Therefore, as an alternative approach, the conditions should not sunset after a specified period but rather apply until Applicants are able to show, after merger conditions have been in place for 42 months or longer, that the Commission should forbear from applying the conditions because the Section 10 forbearance standard is satisfied.

B. UNE and Related Commitments Associated with Serving Areas Where Section 251(c) Obligations Currently Apply to Qwest and CenturyLink.

1. Rates, Wire Center Impairment, EEL Audits, and Tandem Transit

As in prior mergers between an ILEC and an IXC that had facilities in the territory of its merger partner, the Commission should obtain voluntary commitments relating to Section 251(c)(3) UNEs. In such prior mergers, the Commission, in approving the application in the face of claims of reduction in competition, took "comfort in certain voluntary commitments which the

[147] 47 U.S.C. § 160(b) (providing that, "[i]n making the determination under section 10(a)(3), the Commission shall consider whether forbearance…will promote competitive market conditions").

[148] *See Cellular Telecomms. & Internet Ass'n v. FCC,* 330 F.3d 502, 509 (D.C. Cir. 2003) (explaining that "[t]he three prongs of § 10(a) are conjunctive" and that "[t]he Commission could properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.")

Applicants have made relating to unbundled network elements. . . ..”[149] Such commitments are provided below and as presented, should be imposed as conditions on this merger.

- Applicants’ ILECs shall cap UNE rates at current levels.[150]
- Applicants shall recompute the number of fiber-based collocators in identifying wire centers in which Qwest or CenturyLink claims there is no impairment pursuant to 47 C,F.R. § 51.319(a)-(e) to exclude the merger partner as a fiber-based collocator.[151] Joint Commenters suggest that this commitment be modified in two respects: (1) Recalculation should only count those carriers that own and operate the entire fiber-optic cable (from manhole to POI or vault) that exits a Qwest/CenturyLink wire center. Carriers that utilize or otherwise access another carrier’s fiber optic cable in a wire center should not be counted as fiber-based collocators. This excludes carriers operating pursuant to an IRU; (2) revisiting non-impairment wire center thresholds annually, as number of fiber-based collocators may have changed.
- Applicants shall cease all ongoing or threatened audits of EEL eligibility and not initiate new EEL audits.[152]
- Applicants’ ILECs shall not increase the rates paid by existing customers for their existing tandem transit service arrangements that the Qwest and CenturyLink ILECs provide in the Qwest/CenturyLink in-region territory.[153]

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[149] *See SBC/AT&T Merger Order*, ¶ 51; see also *Verizon/MCI Merger Order*, ¶ 51;; *AT&T/BellSouth Merger Order*, ¶¶ 185, 222.

[150] *See Verizon/MCI Merger Order,* at *Appendix G,* p. 128*; SBC/AT&T Merger Order* at Appendix F, p. 122.; *AT&T/BellSouth Merger Order*, at Appendix F, p. 149. As provided below, Joint Commenters also propose that the Commission require Applicants to maintain their current tandem transit rates, as was done in the *AT&T/BellSouth Merger Order,* at Appendix F, p. 153. Notably, while Applicants commit that they will provide service to their wholesale customers “at the same rates and on the same terms and conditions immediately after the merger as immediately prior to the transaction” (Application at p. 37), this commitment is worthless. The commitment to provide service at the same rates “immediately after the merger ” could last as little as one day. Joint Commenters seek a more substantial commitment, upon which they can base business decisions.

[151] *See Verizon/MCI Merger Order,* at Appendix G, p. 129*; SBC/AT&T Merger Order,* at Appendix F, p. 122.; *AT&T/BellSouth Merger Order,* at Appendix F, p. 149.

[152] *See AT&T/BellSouth Merger Order,* at Appendix F, p. 149.

[153] *See AT&T/BellSouth Merger Order,* at Appendix F, p. 153. While tandem transit service is not technically a UNE, this condition was incorporated into the AT&T/BellSouth merger conditions, and the pro-competitive rationale for capping tandem transit rates is similar to the rationale for capping UNE rates.

2. Access to Loops: Copper Loop Retirement and Fiber Loop Facilities

As demonstrated above, a substantial loss of wireline and broadband competition in Qwest and CenturyLink's markets would be lost if the Commission approves this merger. To replace the lost competition, the Commission should impose conditions on the merger that would offset this loss of wireline and broadband competition.

Among the conditions needed to address the harms of the merger would be for the Applicants to cease retiring critical last mile copper loop plant used by competitors to provision telecommunications and broadband services to end user customers until the Commission concludes its open rulemaking on copper loop retirement.[154] Numerous submissions in this rulemaking and the broadband proceeding demonstrate how critical this last mile infrastructure is and why it should not be prematurely retired.[155]

As the explained in the National Broadband Plan, "Competitive carriers are currently using copper to provide SMBs with a competitive alternative for broadband services. Incumbent carriers are required to share (or "unbundle") certain copper loop facilities, which connect a

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[154] *See* Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers, BridgeCom International, Inc. *et al.* Petition for Rulemaking and Clarification, RM-11358 (consolidated) (filed Jan. 18, 2007) ("Petition of Bridgecom *et al.*") ; s*ee* Petition of XO Communications, LLC, Covad Communications Group, Inc., NuVox Communications and Eschelon Telecom, Inc. for a Rulemaking to Amend Certain Part 51 Rules Applicable to Incumbent LEC Retirement of Copper Loops and Copper Subloops, RM-11358 (consolidated) (filed Jan. 18, 2007).

[155] *See generally* Petition of Bridgecom International, Inc. *et al.*; Reply Comments of Bridgecom International, Inc. *et al.*, RM-11358 (filed Apr. 2, 2007); Letter from Andrew D. Lipman, Counsel for Bridgecom International, Inc. et al., to Marlene H. Dortch, Secretary, FCC, RM-11358 (filed Feb. 15, 2008); Letter from Stephen Goodman, Counsel for Hatteras Networks, Inc., to Marlene H. Dortch, Secretary, FCC, RM-11358 (filed Jan. 28, 2008); Letter from Karen Reidy, COMPTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137 and RM-11358, at 2-4 (filed Dec. 7, 2009); Comments in Response to NBP Public Notice #11 of PAETEC Communications, Inc. *et al.*, GN Docket No. 09-47, 09-51, 09-137, WC Docket No. 05-25, RM-10593, RM-11358, 9-17 (filed Nov. 4, 2009).

customer to the incumbent carrier's central office."[156] The National Broadband Plan recognizes that "By leasing these copper loops and connecting them to their own DSL or Ethernet over copper equipment that is collocated in the central office, competitive carriers are able to provide their own set of integrated broadband, voice and even video services to consumers and small businesses."[157]

In the recently released *Phoenix Forbearance Order*, the Commission even stated that several providers, by attaching "their own equipment to legacy copper loops leased as UNEs, . . . have been able to differentiate their service offerings and provide additional choices to residential or business customers in markets entered by relying on UNEs."[158] It identified competitive providers that are "able to offer telephone, television, and broadband Internet services, thus promoting competition for voice, video, and broadband services"[159] and recognized that even if such providers are not in a market the only realistic potential for "similarly situated entities to enter a market is through the continued availability of such facilities."[160] The Commission acknowledged that a vast array of enterprise customers and mass market customers are being provisioned advanced services over copper loops.[161]

These developments increase the Applicants' incentives to retire copper loops. The Applicants' expenditures on fiber loops enhance their incentives to assure that CLECs cannot

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[156] FCC, OMNIBUS BROADBAND INITIATIVE (OBI), CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, GN Docket No. 09-51, 48 (2010) ("National Broadband Plan").

[157] *Id*.

[158] *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, FCC 10-113, ¶ 102 (rel. June 22, 2010) ("*Phoenix Forbearance Order*").

[159] *Id*.

[160] *Id*.

[161] *Phoenix Forbearance Order*, ¶ 103.

provide competing services using legacy copper. Retirement of copper is an effective way for Applicants to thwart intramodal competition. The Commission's rules do not, however, currently provide adequate protection against discriminatory retirement of copper loops by ILECs.[162] Therefore, at the present time, Applicants have insufficient constraints on their ability to act on their anticompetitive motivations to engage in the wasteful retirement of legacy plant that consumers already paid for, in order to prevent this from becoming a third broadband wired platform to the home. As a combined entity, the Applicants will have an increased incentive to do this given their increased market power and larger controlling market area.[163]

Accordingly, as a condition on any approval of the merger, the Commission should require that the merged entity not retire decommissioned copper loops and shall provide unbundled access to it pursuant to Section 251(c)(3) until such time as the Commission's rulemaking on copper retirement in RM-11358 has concluded. This is a relatively costless safeguard that would preserve this vital source of competition in the marketplace.[164]

Applicants should also be required to provide unbundled access, pursuant to Section 251(c)(3), to the packetized bandwidth of hybrid fiber-copper loops along with fiber-to-the home ("FTTH") and fiber-to-the curb ("FTTC") loops for the purpose of serving small and

[162] *See, e.g.,* Letter from Karen Reidy, COMPTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137 and RM-11358, at 2-4 (filed Dec. 7, 2009).

[163] *See SBC/Ameritech Merger Order*, ¶ 196.

[164] In the *AT&T/BellSouth Merger Order*, the Commission rejected pleas that a similar condition be imposed because "[r]ules governing the circumstances under which a carrier may retire copper loops are more appropriately addressed in the context of a rulemaking proceeding." *AT&T/BellSouth Merger Order,* ¶ 196. More than three years have passed since the petitions for rulemaking on copper retirement were filed and it is not clear how many more years will pass until decision on the petitions is issued by the Commission. Until such time, Joint Commenters are simply asking that the Applicants cease retiring copper loops.

medium size business customers (herein jointly referred to as "fiber loop facilities")[165] Even where copper loops are currently available, they still pose challenges for CLECs that rely on such facilities to compete in the broadband market. In markets where ILECs have deployed fiber to the remote terminal, CLEC are unable to access copper or fiber feeder in the loop and accessing the distribution loop is cost-prohibitive.[166] Moreover, there are distance limitations on fully robust advanced services that can be provisioned over copper loops to many business locations.[167] Consequently, many business customers are unable to access and adopt broadband applications through the use of next-generation business-class technology that is provisioned over copper. Competitive access to fiber is therefore necessary to ensure that business customers in all locations will have access to new applications and competitors over a viable broadband connection. To offset the competitive harms the merger will produce, the Commission should impose this condition on the merger.

Accordingly, Joint Commenters propose the following conditions:

- Applicants' ILECs shall cease retiring copper loops until the Commission concludes its rulemaking in RM-11358.
- Applicants' ILECs shall provide 251(c)(3) unbundled access at cost-based (using actual rather than forward-looking) rates, which Qwest/CenturyLink propose prior to the approval of the transaction, to the packetized bandwidth of hybrid fiber-copper loops along with fiber-to-the home ("FTTH") and fiber-to-the curb ("FTTC") loops for the purpose of serving small business customers.

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[165] While the Commission is considering this issue in WC Docket No. 09-223, this obligation can be imposed on the Applicants regardless of the outcome of that proceeding as a merger commitment.

[166] Comments of Covad Communications Company, WC Docket No. 09-223, at 18 (filed Jan. 22, 2010).

[167] Comments of PAETEC Holding Corp., WC Docket No. 09-223, at 5 (filed Jan. 22, 2010). As for the hope that CLECs will self-provision their own last mile facilities, the QSI Report shows that, by and large, self provisioning to small and medium sized business customers is "'cost prohibitive and economically non-viable.'" Comments of Covad Communications Company, WC Docket No. 09-223, at 14 (filed Jan. 22, 2010).

3. Performance Plan

Another condition that will offset some of the competitive harm resulting from the merger is to provide a performance metrics and remedy plan through the territory of the merged entity. Such a plan facilitates competition by ensuring that an ILEC provide service to CLECs and their customers that is roughly comparable to the service it provides to its own retail customers. Qwest already has such a plan throughout its region, and CenturyLink has such a plan for the former Embarq properties in several of its states, such as Florida and Nevada. Joint Commenters recommend that the merged entity commit to adopt a plan for each property that is comparable in coverage to the Qwest plan, the Embarq plan, or the plan of the largest ILEC in the state.

In the *AT&T/BellSouth Merger Order,* the Commission acknowledged the importance of "comprehensive performance plans…containing self-executing remedies to measure the success of the competition-opening provisions of the 1996 Act."[168] Because AT&T and BellSouth had such comprehensive plans in place, the Commission rejected arguments that the merger of these two companies will result in a loss of a critical benchmark. The Commission explained that "[t]he performance of other companies is not germane to the question of whether the performance of the company under scrutiny is improving, deteriorating, or staying the same."[169] It stated that "[i]f closer monitoring were to become necessary, the Commission would more likely evaluate an incumbent LEC's performance over time, and specifically compare the carrier's current performance against previous performance measurements, rather than compare the incumbent LEC against another BOC carrier."[170]

[168] *AT&T/BellSouth Merger Order,* ¶ 189.

[169] *Id*.

[170] *Id*.

While Joint Commenters do not agree with the Commission's rationale to reject the need for benchmarking for the reasons stated elsewhere in these comments, the Commission's decision recognizes that "comprehensive performance plans" need to be in-place so that Commission can evaluate an incumbent's performance over time.

In this case, the Applicants' performance plans do not cover their entire region.[171] Consequently, in serving areas where performance plans are not in-place and do not otherwise track the performance of the Applicants, the Commission is unable to track the Applicants' performance in these areas and assess if Applicants are discriminating against competitors in these areas.

Therefore, Joint Commenters propose the following condition:

- In CenturyLink ILEC territories where performance metrics and a remedy plan do not currently apply Applicants shall adopt a performance metrics and remedy plan that parallels the performance metrics and remedies plan of Qwest, Embarq, or the largest ILEC in the state.

C. Reducing Transaction Costs Associated with ICAs Covering Serving Areas Where Section 251(c) Obligations Currently Apply to Qwest and CenturyLink.

As in prior mergers involving BOCs, the increased incentive and ability of the merged entity to discriminate against competitors, and synergies of the merger supported voluntary commitments by Applicants that would reduce the transaction costs associated with Section 252

[171] As explained elsewhere herein, in much of its region, CenturyLink is not subject to any performance assurance plan. Nor do the performance assurance plans to which Applicants are subject apply to all the services offered by Applicants (rather, where applicable, they apply only to select services). Thus, if the Commission is to rely on performance assurance plans as a substitute for benchmarking, it must ensure that the combined company is subject to performance assurance plans throughout its region and that performance assurance plans cover all the services offered at wholesale by the Applicants.

interconnection agreements.[172] For instance, in the *AT&T/BellSouth Merger Order*, AT&T voluntarily committed to: (1) making available to any requesting telecommunications carrier any entire effective interconnection agreement ("ICA"), whether negotiated or arbitrated, that a AT&T/BellSouth ILEC entered into in any state in the AT&T/BellSouth 22-state ILEC operating territory subject to state specific pricing among other things; (2) not refusing "a request by a telecommunications carrier to opt into an agreement on the ground that the agreement has not been amended to reflect changes of law," subject to certain requirements; (3) allowing "a requesting telecommunications carrier to use its preexisting interconnection agreement as the starting point for negotiating a new agreement"; (4) permitting "a requesting telecommunications carrier to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years, subject to amendment to reflect prior and future changes of law."[173] In the *AT&T/BellSouth Merger Order*, the Commission stated these conditions "should reduce any incremental effect of the pending merger on the incentive to discriminate."[174]

For similar reasons, to reduce discrimination incentives and share a portion of the Applicants' stated "synergies"[175] associated with this transaction with competitors, thereby benefiting the public by preserving competition, the Commission should impose the following conditions, designed to reduce transaction costs associated with § 252 ICAs:

- Applicants' ILECs shall allow an entire negotiated or arbitrated ICA with Qwest/CenturyLink to be ported to other Qwest/CenturyLink ILEC

[172] *AT&T/BellSouth Merger Order*, at Appendix F, pp. 149-150; *see also SBC/Ameritech Order*, ¶¶ 490-492, Appendix C ¶¶ 42-44; *Bell Atlantic/GTE Merger Order*, ¶¶ 300-306, Appendix D ¶¶ 30-33.

[173] *AT&T/BellSouth Merger Order*, at Appendix F, pp.149-150.

[174] *AT&T/BellSouth Merger Order*, ¶ 185.

[175] Application, at 21-22.

operating territories in another state, subject to state specific pricing and technical feasibility.[176] Joint Commenters suggest that the commitment under the *AT&T/BellSouth Merger Order* be modified so that the condition would *only* be subject to state specific pricing and technical feasibility. Because the ICA would be considered negotiated under Section 252, it would not need to be modified to reflect state specific laws unless a state commission holds otherwise when it reviews the agreement under Section 252(e)).

- Applicants' ILECs shall permit ICA adoption even if ICA has not been amended to reflect changes of law.[177]

- Applicants' ILECs shall permit the use of an existing ICA as the starting point for negotiating a new agreement.[178]

- Applicants' ILECs shall permit requesting carriers to extend current ICAs, regardless of whether initial term has expired, for a period of three years subject to amendment to reflect prior and future changes in law.[179] Because of litigation that resulted from disagreements in interpreting this AT&T/BellSouth merger condition,[180] Joint Commenters suggest that the

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[176] *See AT&T/BellSouth Merger Order*, at Appendix F, p.149.

[177] *See id.*

[178] *See id.*

[179] *See id.* at 150.

[180] *See, e.g., In the Matter of the Application of Sprint Communications Company L.P.(U5112C) for Commission Approval of an Amendment Extending its Existing Interconnection Agreement for Three Years with the Pacific Bell Telephone Company dba AT&T California pursuant to the Merger Commitment Voluntarily Created and Accepted by AT&T, Inc. (AT&T), as a Condition of Securing Federal Communications Commission Approval of AT&T's Merger with BellSouth Corporation*, Application 09-06-006, Decision Granting Applicant's Motion for Summary Adjudication, at 2 (Cal. P.U.C. Jan 21, 2010) (explaining in that "state utility commissions in Connecticut, Kentucky, Missouri and Michigan have previously considered the meaning of Merger Commitment 7.4 as applied to expired ICAs between local AT&T affiliates and Sprint. All four commissions have concluded that Sprint is entitled to extend its expired ICAs for an additional three years."); *In the Matter of the Carrier-to-Carrier Complaint and Request for Expedited Ruling of Sprint Commc'ns Co. L.P et al. v. The Ohio Bell Tel. Co. d/b/a AT&T of Ohio Relate to the adoption of an Interconnection Agreement*, Case No. 07-1136-TP-CSS, Order, ¶ ¶ 14, 23, 24 (Ohio P.U.C. Mar. 31, 2010) (stating in para. 25 that "California, Connecticut, Kansas, Kentucky, Michigan, and Missouri have considered this question and have decided in favor of Sprint's interpretation of Merger Commitment 4. In our own review of the plain language of the Merger Commitment, we are persuaded by the arguments of Sprint and the decisions and reasoning of our sister states. We, therefore, …find that the subject interconnection agreements are current and eligible for extension pursuant to Merger Commitment 4.") (footnotes omitted).

Commission clarify that: (1) CLECs shall be permitted to extend their ICAs for an additional three years while the merger conditions are in effect (stated differently, a request to extend an ICA may be made at any time while the condition is in effect); (2) Qwest/CenturyLink shall not attempt to limit the application of this condition in any manner through rules or policies it imposes in implementing this condition; and (3) A "current ICA" includes any agreement that is still being performed by the parties, regardless of whether its term has expired or either party has purported to terminate it.

- Applicants' ILECs shall offer a multistate ICA that extends the Qwest terms and conditions into the CenturyLink ILEC region.[181]

- Applicants' ILECs shall not oppose state commissions from enforcing and arbitrating the issues associated with any 251 or 271 merger conditions.[182]

D. Reducing Transaction Costs Associated with Qwest's Local Services Platform ("QLSP") (formerly known as "QPP"), Line Sharing and Other Similar Commercial Agreements

In light of the *TRO* and *TRRO* (which limited the availability of certain Section 251(c)(3) UNEs such as DS1 and DS3 loop and transport from certain wire centers),[183] a number of

[181] *See, e.g., Bell Atlantic/GTE Merger Order*, Appendix D, at Condition X.

[182] Movants propose this condition because AT&T frustrated the purpose of its merger conditions by challenging state commission authority to enforce merger conditions that apply to Section 252 ICAs. *See, e.g., Michigan Bell Telephone Company v. Isiogu, et al.*, 2010 WL 746377, *7 (E.D. Mich. Mar. 2, 2010); *In the Matter of the Verified Petition of Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel West Corp. for Arbitration of Interconnection Agreements with Southwestern Bell Telephone Company, d/b/a AT&T Missouri*, Case No. CO-2009-0239, Order Denying Application for Reconsideration and Adopting Arbitrator's Final Report, at 3 (Mo. P.S.C. May 12, 2009); *In the Matter of the Carrier-to-Carrier Complaint and Request for Expedited Ruling of Sprint Commc'ns Co. L.P et al. v. The Ohio Bell Tel. Co. d/b/a AT&T of Ohio Relate to the adoption of an Interconnection Agreement*, Case No. 07-1136-TP-CSS, Order, ¶ ¶ 14, 23, 24 (Ohio PUC Mar. 31, 2010).

[183] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*TRO*"), *corrected by* Errata, 18 FCC Rcd 19020 (2003), *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004), *cert. denied sub nom. Nat'l Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004); *see Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Remand, 20 FCC

CLECs operating in Qwest territories entered into commercial agreements for a combined wireline voice offering (known as the Qwest Local Services Platform ("QLSP™")), which includes a combination of the local loop, port, switching and shared transport elements, so that they may offer competitive voice services to residential and business customers.[184] In addition, a number of CLECs entered into commercial agreements with Qwest for line sharing. Some of these agreements will expire in 2011 and there is a concern that Applicants, especially Qwest, may or will raise prices as well as offer retail prices that are below their commercial wholesale offerings.[185] At the same time, viable wholesale commercial alternatives to the Applicants' offerings (that could potentially eliminate dependence on the Applicants for last mile access to customers) are not or will not likely be sufficiently available throughout their regions for the foreseeable future.

For these reasons, the Commission should require as a condition of any approval of the proposed merger that the Applicants offer CLECs the option of continuing current commercial agreements in effect for the full duration of merger conditions. This will not be burdensome to the Applicants since the negotiated prices are presumptively acceptable to the Applicants. Further, if Applicants' claims of increasing competition are correct, it would stand to reason that prices negotiated after the merger would be lower than those established several years ago.

Rcd 2533, ¶¶ 149-154 (2005) ("*TRRO*"), *aff'd*, *Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[184] *See, e.g.,* http://www.qwest.com/wholesale/pcat/qlspbusres.html; http://www.qwest.com/wholesale/clecs/commercialagreements.html (both last visited July 12, 2010).

[185] Moreover, there are concerns that if the Applicants extend these commercial agreements, especially the ones that terminate in 2011, the volume retention and growth pricing plans under the agreements will not be based upon 2009 volume levels of the specific competitive carrier that obtains services under the agreement. They should be since Qwest eliminated the incentive for competitive providers to achieve such volume levels under these agreements during 2010 by not offering an extension to the agreements that expire in 2011.

Hence, affording CLECs the option of continuing commercial agreements should not harm the Applicants. At the same time, however, this condition would further promote regulatory certainty and competition.

In addition, the Commission should require that as a condition of the merger, Applicants' commercial agreements with CLECs include the offering of voice services when fiber facilities are deployed directly to business locations. Qwest has not offered voice services over such facilities under a commercial agreement. For instance, Qwest's QLSP™ is an analog voice-grade service that may be offered to business customers. The service is not, however, available where customers are served by facilities that are exclusively fiber and packet-based.[186] As a consequence, business customers served by such facilities do not have competitive options that would otherwise be available to them if services were provisioned to them over analog facilities.

Because these business customers may have many locations, Applicants are able to impede competitors from serving such customers across an entire region by not offering a service that is similar to QLSP™ that is provisioned over fiber and is digital-based, i.e., non-analog-based facilities. For example, if a business has 100 locations in Applicants' territory and Applicants serve 10 of those locations over fiber, because a competitive carrier cannot offer service to the 10 locations served by fiber, it will likely lose the business of the 90 locations served by copper. Moreover, as a condition of the merger, the Commission should also require Applicants to make other services offered over non-analog-based facilities, including, but not limited to, Qwest's Ethernet services,[187] available under region-wide commercial agreements.[188]

[186] *See* http://www.qwest.com/wholesale/pcat/qlspbusres.html.

[187] For example, Qwest' s Metro Optical Ethernet service, among other broadband services, should be made available at wholesale on a commercial basis. *See* http://www.qwest.com/business/products/products-and-services/data-networking/metro-optical-ethernet.html.

For the foregoing reasons, Joint Commenters propose the following conditions:

- Similar to Bullet 1 in Section C, above. Applicants' ILECs shall allow entire negotiated commercial QLSP™ and line sharing agreements with Qwest to be ported to CenturyLink ILEC operating territories subject to state specific pricing, based on Qwest's pricing model, and technical feasibility.

- Similar to Bullet 3 in Section C, above. Applicants' ILECs shall permit use of existing commercial QLSP™ and line sharing agreements as the starting point for negotiating a new agreement.

- Similar to Bullet 4 in Section C, above. Applicants' ILECs shall permit requesting carriers to extend current commercial QLSP™ and line sharing agreements, regardless of whether initial term has expired, for a period of three years subject to amendment to reflect prior and future changes in law; provided that the volume retention and growth pricing plans under the commercial agreements that expire in 2011 will be based on the 2009 actual sales volume levels of the specific competitive carrier that obtains services under the agreement.

- Similar to Bullet 5 in Section C, above. Applicants shall extend the commercial QLSP™ and line sharing agreements to the CenturyLink ILEC region.

- Applicants' ILECs shall make available at wholesale under commercial agreements non-analog-based services, including, but not limited to, voice and Ethernet services, among other broadband services, that are provided over fiber facilities.

E. Special Access

As discussed above, Applicants admit that there are a number of buildings into which they each have direct connections, although they are very vague as to the number, with Qwest going so far as to suggest that it cannot identify the buildings in CenturyLink ILEC territory to its network is directly connected. Because each of the Applicants has a direct connection to those buildings, each has the capability to offer special access to those buildings. As has been demonstrated in WC Docket 05-25, rates of return on special access are exorbitant, and reflect

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[188] The offerings under these commercial agreements should be available where the Applicants are the incumbent local exchange carrier for a given region, territory or exchange.

the unabated exercise of extraordinary market power. As shown in the January 19, 2010 Comments of the Ad Hoc Telecommunications Users Committee in WC Docket 05-25, Qwest's rate of return on special access for 2007, the most recent year for which data was available, was 175%, more than fifteen times the authorized rate of return of 11.25% that was in effect when rate of return regulation was ended.[189] Eliminating CenturyLink as a potential competitive source of special access in some buildings in Qwest's territory can only exacerbate the conditions that permitted Qwest to extract these exorbitant returns. Likewise, eliminating Qwest as a potential competitive source of special access in some buildings in CenturyLink's territory can only exacerbate the conditions that permitted CenturyLink to extract above-market returns.[190]

In prior mergers in which the merging parties both had connections in the same buildings, the Commission concluded that the elimination of competition between the merging parties in the provision of special access in certain buildings was "likely to result in anticompetitive effects," including increases in special access prices on an MSA-wide basis, absent "appropriate remedies."[191] In the AT&T/SBC, Verizon/MCI, and AT&T/BellSouth mergers, the applicants all agreed to conditions designed to ameliorate the anticompetitive effects in the special access

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[189] Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-25, at Appendix B p.3 (filed Jan. 19, 2010).

[190] In 2009, CenturyLink's ARMIS accounting rate-of-return was an incredible 354%. The annual rate of return was calculated using CenturyTel's and Embarq's combined 2009 ARMIS data reported for interstate special access services. To calculate the rate-of-return, the net return was divided by average net investment *See* ARMIS 43-01, Table 1, Cost and Revenue, rows 1910, 1915, col. s. In the Special Access proceeding, the Commission has taken this approach in computing the ARMIS rate-of return. See *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, ¶ 27 n.90 (rel. Jan. 31, 2005).

[191] *SBC/AT&T Merger Order*, ¶ 32: *Verizon/MCI Merger Order*, ¶ 32.

market of mergers in which one of the merging parties is an IXC with direct connections in the other party's ILEC territory. As the Commission stated in discussing the impact of the mergers on the special access market in its *Verizon/MCI* and *SBC/AT&T Merger Orders,* "the voluntary commitments that the Applicants have offered, and which we accept and make conditions of our approval of this order, provide us with further comfort that the merger is not likely to result in anticompetitive effects" in special access markets.[192] Because this merger is like the AT&T/SBC, Verizon/MCI, and AT&T/BellSouth mergers in that one of the merging parties is an IXC with direct connections in the other party's ILEC territory, similar relief is appropriate.

Such relief includes the following merger conditions:

- Applicants' ILECs shall Implement Service Quality Management Plan for Interstate Special Access Services.[193]
- Applicants shall not increase the price cap rates paid by existing customers (as of the Merger Closing Date) for DS1 and DS3 local private line services.[194]
- Applicants shall not provide special access offerings to the Applicants' wireline affiliates that are not available to other similarly situated special access customers on the same terms and conditions.[195]
- To ensure that Qwest/CenturyLink not provide special access offerings to its affiliates that are not available to other special access customers, before Qwest/CenturyLink provides a new or modified contract tariff service, it will certify to the FCC that it provides services pursuant to the contract tariff to an

[192] *Verizon/MCI Merger Order*, ¶ 48 (footnote omitted); *see id.* ¶ 24, ¶ 51 ("we find further comfort in certain voluntary commitments which the Applicants have made relating to unbundled network elements and special access services."); *AT&T/SBC Merger Order,* ¶ 48; *see id.* ¶ 24, ¶ 51 ("we find further comfort in certain voluntary commitments which the Applicants have made relating to unbundled network elements and special access services.").

[193] *See AT&T/BellSouth Merger Order*, at Appendix F, p. 150; *SBC/AT&T Merger Order*, at Appendix F, p. 123; *Verizon/MCI Merger Order,* at Appendix G, p.129.

[194] *See AT&T/BellSouth Merger Order*, at Appendix F, pp.150-51 (Special Access Conditions 2 and 5); *SBC/AT&T Merger Order,* at Appendix F, pp. 123-24 (Special Access Conditions 2 and 5); *Verizon/MCI Merger Order*, at Appendix G, pp. 129-30 (Special Access Conditions 2 and 5).

[195] *See AT&T/BellSouth Merger Order,* at Appendix F, p. 150; *SBC/AT&T Merger Order*, at Appendix F, p. 123; *Verizon/MCI Merger Order,* at Appendix F, p. 129.

unaffiliated customer other than Verizon, AT&T or their wireline affiliates and will not unreasonably discriminate if offering grooming of special access facilities.[196]

- Applicants' ILECs shall reset special access rates, including Ethernet services, that are higher in pricing flexibility areas, to price cap levels. In Phase II areas, Applicants also will reduce by 15% the rates in its interstate tariffs for Ethernet services that are not at that time subject to price cap regulation.[197]

- Applicants shall not oppose any request by a purchaser of interstate special access services for mediation by Commission staff of disputes relating to Qwest/CenturyLink compliance with the rates, terms, and conditions set forth in its interstate special access tariffs and pricing flexibility contracts or to the lawfulness of the rates, terms, and conditions in such tariffs and contracts, and not oppose any request that such disputes be accepted by the Commission onto the Accelerated Docket.[198]

- Applicants' ILECs shall not include in any pricing flexibility contract or tariff filed with the Commission after the Merger Closing Date access service ratio terms which limit the extent to which customers may obtain transmission services as UNEs, rather than special access services.[199]

- Applicants' ILECs shall file one or more interstate tariffs that make available to customers of DS1, DS3, and Ethernet service reasonable volume and term discounts without minimum annual revenue commitments (MARCs) or growth discounts. To the extent an Qwest/CenturyLink ILEC files an interstate tariff for DS1, DS3, or Ethernet services with a varying MARC, it will at the same time file an interstate tariff for such services with a fixed MARC. For purposes of these commitments, a MARC is a requirement that the customer maintain a minimum specified level of spending for specified services per year.[200]

- If, during the course of any negotiation for an interstate pricing flexibility contract, Applicants offer a proposal that includes a MARC, Applicants shall offer an alternative proposal that gives the customer the option of obtaining a volume and/or term discount(s) without a MARC. If, during the course of any negotiation for an interstate pricing flexibility contract, Applicants offer a proposal that includes a MARC that varies over the life of the contract,

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[196] *See AT&T/BellSouth Merger Order*, at Appendix F, p. 150; *SBC/AT&T Merger Order*, at Appendix F, pp. 123-24; *Verizon/GTE Merger Order*, at Appendix F, pp. 129-30.

[197] *See AT&T/BellSouth Merger Order*, at Appendix F, pp. 151; *see also AT&T Merger Order on Reconsideration*, at Appendix.

[198] *See id.* at 152.

[199] *See id.*

[200] *See id.*

Applicants shall offer an alternative proposal that includes a fixed MARC.[201]

- Applicants' ILECs shall give notice to customers of Qwest/CenturyLink with interstate pricing flexibility contracts that provide for a MARC that varies over the life of the contract that, within 45 days of such notice, customers may elect to freeze, for the remaining term of such pricing flexibility contract, the MARC in effect as of the Merger Closing Date, provided that the customer also freezes, for the remaining term of such pricing flexibility contract, the contract discount rate (or specified rate if the contract sets forth specific rates rather than discounts off of referenced tariffed rates) in effect as of the Merger Closing Date.[202]
- Applicants shall divest IRUs to fiber strands in buildings in which the Applicants have the only direct connections and competitive entry is unlikely.[203]
- Establish the same installation and repair intervals for CenturyLink as Qwest.[204]

F. ADSL/ISP Service

In the Bell Atlantic/GTE and SBC/AT&T mergers, the Commission rejected arguments by Qwest, among others, that consumers would be worse off without the merger, noting, among other things, that it took "comfort from the Applicants' voluntary commitment to offer stand-alone DSL."[205] The merger conditions thus required the applicants to offer end users ADSL without requiring that they purchase circuit switched voice grade telephone service.[206] Today,

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[201] *See id.*

[202] *See id.*

[203] *See id.* at 156.

[204] Qwest intervals for installation and repair of special access circuits are set forth in Qwest's Service Interval Guide, accessible at http://www.qwest.com/wholesale/guides/sig/index.html, while CenturyLink's processes for special access are set forth at page 32 of a Service Guide accessible at http://www.centurylink.com/business/Wholesale/InterconnectionServices/Library/CenturyTelServiceGuide.pdf, which has no intervals at all for installation or repaid of special access circuits. Application of best practices principles supports extending the Qwest intervals to CenturyLink territory.

[205] *Verizon/MCI Merger Order,* ¶ 105; *SBC/AT&T Merger Order,* ¶ 104.

[206] *Verizon/MCI Merger Order,* at Appendix G, p. 130*;* *SBC/AT&T Merger Order,* at Appendix F, p. 124;

Qwest offers ADSL service to CLECs through commercial agreements, even where Qwest is not providing voice service to the end user. CenturyLink does likewise in Embarq territory, but not in CenturyTel territory. Moreover, in Embarq territory, CenturyLink also offers its ISP service. This is a critically important adjunct to the ADSL service because it permits the customer to switch its package of voice/data/internet access service to a CLEC without requiring the end user to change its ISP address. When a business with locations and multiple IP addresses has to change some of its IP addresses, that creates considerable additional work and expense. As a result, many business customers in Qwest territory are unwilling to change their voice and data service because of the disruption caused by the need to change their IP address. Thus, competition for voice and data service is suppressed.

Joint Commenters suggest that Applicants commit to adopt the "best practices" of Embarq and agree as follows:

- Applicants shall make available through commercial agreements within the Qwest/CenturyLink ILEC territories ADSL service to ADSL-capable customers and ISP service where Applicants currently offer such service.

G. Broadband Service to CLECs

The Commission's National Broadband Plan seeks to promote the deployment and competitiveness of broadband services. Because post merger, each of the Applicants will no longer be competing against the other to provide broadband services to residential and business customers, the Commission should offset the public interest harms caused by the elimination of this competition by requiring that the Applicants offer their broadband services available to other providers at a promotional discount rate of 30%.[207] Such a condition would provide end users additional providers from which broadband services could be obtained. For this reason, Joint Commenters propose the following condition.

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[207] *See SBC/Ameritech Merger Order*, at Appendix D ¶¶ 47-52; *Bell Atlantic/GTE Merger Order*, at Appendix C, ¶¶ 34-38.

- Applicants' ILECs shall make broadband services available for resale at a 30% resale discount.

H. Forbearance

In the *AT&T/BellSouth Merger Order*, AT&T voluntarily offered merger conditions that restricted it from seeking or giving effect to a ruling or any other petition that would alter the status of any currently provisioned facility, including, but not limited to, wire center classifications and Section 251(c)(3) loop and transport UNEs.[208] In addition, AT&T committed not to seek forbearance of any responsibilities under the merger conditions while they are in effect.[209] Ostensibly, AT&T recognized the competitive harms associated with its proposed merger with BellSouth, it therefore offered merger conditions that would serve to offset the harms by committing not to seek forbearance of critical Section 251(c)(3) loop and transport unbundling inputs that CLECs would utilize in competing against the merged entity. Applicants should offer similar conditions.

In addition, Qwest should relinquish the unbundling forbearance it received in the Omaha MSA because this forbearance it obtained destroyed retail competition in the Omaha market and produced an anticompetitive duopoly. In its recent *Phoenix Forbearance Order*, the FCC chose not to apply the test it employed in the *Omaha Forbearance Order*[210] in granting Qwest forbearance from Section 251(c)(3) unbundling obligations in certain significant Omaha wire centers. The FCC explained that the test is in the *Omaha Forbearance Order*, which relied on retail mass market share for telephone subscribers and the geographic reach of the incumbent cable company's network,[211] "is not supported by current economic theory,"[212] "inappropriately

[208] *AT&T/BellSouth Merger Order*, at Appendix F, p. 155.

[209] *Id.*

[210] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*"), *aff'd, Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

[211] *Phoenix Forbearance Order*, ¶ 27.

[212] *Phoenix Forbearance Order*, ¶ 28.

assumed that a duopoly always constitutes effective competition,"[213] and is "inconsistent with Congress' imposition of unbundling."[214] The FCC further concluded that the predictive judgments made by the FCC in the *Omaha Forbearance Order* "have not been borne out by subsequent developments"[215] and that it "reached [] competitive conclusions based on an unsound approach and unrealistic predictions."[216] Instead, the Commission evaluated Qwest's Phoenix Petition "using a market power analysis, similar to that used by the Commission in many prior proceedings and by the Federal Trade Commission (FTC) and the Department of Justice (DOJ) in antitrust reviews."[217]

While the Commission has pending before it McLeodUSA's Petition for Modification of *Omaha Forbearance Order*, which seeks to re-impose Qwest's Section 251(c)(3) unbundling obligations and restore the appropriate levels of wholesale competition in the Omaha market, the Commission should not approve this merger if doing so will strengthen rather than reduce Qwest's market power in Omaha or encourage Qwest's efforts to seek forbearance relief elsewhere. Recognizing these significant harms, as a condition to any approval of the merger, Qwest should voluntarily stipulate that McLeodUSA's Petition for *Omaha Forbearance Order* Modification be granted and relinquish the Section 251(c)(3) unbundling forbearance it received in the *Omaha Forbearance Order*. In addition, Qwest should withdraw its 4-MSA petition that is on remand in WC Docket No. 07-97 and agree not to challenge or appeal the *Qwest Phoenix Forbearance Order*.

Accordingly, Joint Commenters propose the following conditions be imposed on the merger:

- Applicants shall not seek or give effect to a ruling, including through a

[213] *Id.* ¶ 29.

[214] *Id.* ¶ 32.

[215] *Id.* ¶ 34.

[216] *Id.* n.309.

[217] *Id.* ¶ 1.

forbearance petition under section 10 of the Communications Act (the "Act") 47 U.S.C. 160, or any other petition, altering the status of any facility, including, but not limited to, wire center classifications, being currently offered as a loop or transport UNE under section 251(c)(3) of the Act.[218]

- Applicants shall not seek or give effect to any future grant of forbearance that diminishes or supersedes the merged entity's obligations or responsibilities under these merger commitments during the period in which those obligations are in effect.[219]
- Applicants shall voluntarily stipulate that McLeodUSA's Petition for Modification be granted and thereby, relinquish forbearance relief obtained in Omaha in WC Docket No. 04-223 and comply with Section 251(c)(3) UNE obligations throughout the Omaha MSA.
- Applicants shall voluntarily withdraw the Qwest 4-MSA petition on remand in WC Docket No. 07-97 and agree not to challenge or appeal FCC orders denying any forbearance petitions, including, but not limited to the *Qwest Phoenix Forbearance Order*, that may be pending.

I. Operational Support Systems

As discussed in Section III.A, above, Applicants have different OSS, but have not disclosed their intentions regarding reconciling the differences between Qwest's and CenturyLink's OSS, and Joint Commenters have grave concerns about the ability of CenturyLink's OSS, if used in Qwest territory, to comply with Section 271. If it is Applicants' intention to use a single OSS region wide, CLECs should be permitted to provide input on the OSS to be used and appropriate conditions should be imposed to ensure that CLECs will not be competitively disadvantaged by the OSS selected or by the conversion process. Moreover, measures should be taken to assist CLECs in the conversion process.[220] Depending on Applicants' intentions, additional conditions may be required, but the first step is for Applicants to disclose fully their plans for modifying or integrating key competitively sensitive operating procedures and practices. This should include planned changes, timing, and procedures that would be followed to implement any changes, as well as any efforts Applicants intend to make to

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[218] *See AT&T/BellSouth Merger Order*, at Appendix F, p.155.

[219] *See id.*

[220] *See, e.g., Bell Atlantic/GTE Merger Order*, at Appendix D, Condition No. VII, ¶ 26.

train CLEC personnel who may have to adapt to new OSS procedures. Interested CLECs should then be provided an opportunity to propose appropriate changes or conditions to assure that the Applicants' touted "increased operational efficiencies"[221] will not undermine or harm competition.

J. 271 Conditions

As competitive carriers, including some of the Joint Commenters, have shown in WC Docket No. 09-222,[222] Section 271 is not functioning as intended by Congress. Although Qwest and the other BOCs are reaping the rewards of offering interLATA long-distance and information services, there are no meaningful rules they must obey to ensure they are compliant with their ongoing 271 checklist obligations. Therefore, rules governing the BOCs' Section 271 unbundling obligations are necessary to implement fully the Commission's Sections 201 and 202 just, reasonable and nondiscriminatory standard as it applies to Section 271 network elements.[223] Such rules are also essential to meaningful competition to the benefit of consumers as Section 271 envisioned.

As a consequence of the merger of Qwest and CenturyLink, the combined entity will have an increased incentive and ability to discriminate against wireline competitors.[224]

[221] Application at 21.

[222] *See, e.g.*, 360networks (USA) inc., Broadview Networks, Inc., Cbeyond, Inc., COMPTEL, Covad Communications Company, NuVox, PAETEC Holding Corp., Sprint Nextel Corporation, and tw telecom inc. Petition for Expedited Rulemaking to Adopt Rules Pertaining to the Provision by Regional Bell Operating Companies of Certain Network Elements Pursuant to 47 U.S.C. § 271(c)(2)(B) of the Act, WC Docket No. 09-222 (filed Nov. 9, 2009) ("Section 271 Coalition Petition"); Comments of TDS Metrocom, LLC; and U.S. TelePacific Corp. and Mpower Communications Corp., both d/b/a/ TelePacific Communications, WC Docket No. 09-222 (filed Jan. 12, 2010).

[223] 47 U.S.C. § 271(c)(2)(B)(iv)-(vi) & (x) (collectively referred to as "Section 271 network elements").

[224] *See, e.g., SBC/Ameritech Merger Order*, ¶ 60; *Bell Atlantic/GTE Merger Order*, ¶ 96.

Moreover, where the Section 271 obligations apply, the merged entity will have more of an incentive to exploit the absence of clear rules implementing Section 271. Because of the amorphous nature of the Section 201 and 202 just, reasonable, nondiscriminatory standard that applies to Section 271 network elements, clear conditions should be imposed on the merger that prevent or discourage the merged entity from evading its existing Section 271 obligations where they apply. Qwest has taken advantage of the lack of detailed rules to impose unilaterally excessive, non-negotiable rates for Section 271 network elements.[225] While the Commission hoped market forces would deter such monopolistic behavior, evidence shows that market forces have been unable to compel Qwest to offer reasonable prices or commercially reasonable terms and conditions for its Section 271 offerings.

Therefore, conditions, such as the rules proposed by the Petitioners in WC Docket No. 09-222,[226] should be imposed on the merger that clarify Qwest's obligation to offer Section 271 network elements on just and reasonable rates, terms and conditions. The Petitioners' proposed rules in WC Docket 09-222 provide essential clarifications of Qwest's obligations and include a sound approach to determining rates for Section 271 network elements.[227]

In addition, as complementary additions to Petitioners' proposal in WC Docket 09-222, Joint Commenters propose the imposition a condition that requires Qwest, upon request, to incorporate its Section 271 offerings into Section 252 interconnection agreements and to allow

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[225] *See, e.g.*, Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No 04-223, at 4-12 (filed July 23, 2007); *see also* Letter from Andrew D. Lipman, Counsel for Affinity et al, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed June 30, 2008).

[226] Section 271 Coalition Petition, at Attachment A.

[227] Until rates are established as requested in the Section 271 Coalition Petition, Joint Commenters propose that the Commission require that rates for Section 271 network elements be no higher than 15 percent above state-commission approved prices for the corresponding Section 251(c)(3) UNEs.

provisions associated with a Qwest's Section 271 offerings be subject to Section 252 arbitration before state public utility commissions.[228]

Finally, Joint Commenters recommend that in any merger order that imposes these proposed merger conditions, the Commission make clear that certain terms and conditions are unreasonable on their face, so as to reinforce commingling obligations and further deter Qwest from imposing onerous and unconscionable rates, terms and conditions with its Section 271 offerings.[229] Lack of such obligations in 271 agreements render them to some degree useless without the ability to use 271 elements in conjunction with Section 251(c)(3) UNEs, interconnection and collocation rights. The following rates, terms or conditions should be considered unreasonable on their face:

- Any limitation or restriction on the combination of Section 271 network elements or commingling of Section 271 network elements with Section 251(c) UNEs, interconnection facilities, collocation arrangements or other wholesale services, including, but not limited to, special access services;
- Any limitation or restriction that requires a CLEC to maintain a certain volume of Section 271 network elements during the term of the agreement in order to obtain baseline 271 rates;
- Growth or exclusivity requirements or any provisions that require circuits to be moved from competitors
- Any limitation or restriction on the use of Section 251(c)(3) UNEs if the carrier uses Section 271 network elements
- Any non-recurring charge assessed to simply convert an existing Section 251(c)(3) UNE loop or transport facility or any other facility offered on a wholesale basis, including, but not limited to, special access services, to a Section 271 network element loop or transport facility;
- Any restriction that network elements previously made available pursuant to Section 251(c)(3) (including, but not limited to, conditioned copper loops, subloops, DS1 and

[228] Comments of TDS Metrocom, LLC; and U.S. TelePacific Corp. and Mpower Communications Corp., both d/b/a/ TelePacific Communications, WC Docket No. 09-222, at 15 (filed Jan. 12, 2010).

[229] *Id*. at 15-16.

DS3 loop and transport, dark fiber loops and transport) are not available pursuant to Section 271(c);

- o Any requirement for a certain percentage of the carrier's spend on Section 271 services;
- o Any limitation that Section 271 network elements will not be provisioned if doing so requires routine network modifications; and
- o Any term restricting a customer's ability to pursue any regulatory remedy, such as a rate reasonableness complaint, relating to network elements or any other service, as a condition of purchasing the Section 271 network elements.

Accordingly, Joint Commenters propose the conditions provided below be imposed on the merger and that the Commission clarify in any merger order the rates, terms or conditions referenced above are "unreasonable on their face".

- Applicants shall adopt the Section 271 rules and rates proposed by 271 Coalition in former Qwest regions where it operated as a BOC.
- Applicants shall permit, upon request, the inclusion of Section 271 obligations in Section 252 ICAs and shall allow Section 252 arbitration of Section 271 obligations.

K. IP-Interconnection

The Commission has recognized the challenge of ensuring that "as IP-based services replace circuit-switched services, there is a smooth transition for Americans who use traditional phone service and for the businesses that provide it."[230] "Interconnection" of local exchange networks on an IP-to-IP basis is currently implemented pursuant to commercial relationships (if at all) that are outside the normal telephone company regulatory framework, even as carriers (and especially competitors) increasingly provide local services at the network "edges" through IP technologies and/or employ IP technologies for the more efficient routing of traffic across networks. This creates substantial inefficiencies, compelling CLECs to deploy additional equipment and infrastructure just to convert traffic from IP to TDM for interconnection and the

[230] National Broadband Plan, Ch. 4.5.

exchange of that traffic with an ILEC – even where that ILEC, such as Qwest, also maintains its own substantial IP-based network. The combination of Qwest's and CenturyLink's local markets and Qwest's backbone network will enable the combined company to make increased use of IP technologies across a wider geographic footprint. But the combination will also give the combined ILECs increased market power to deny competing carriers the ability to exchange traffic between their local exchange customers on an IP-to-IP basis and/or to extract unreasonable terms and conditions from CLECs for the right to do so.

Accordingly, if it approves the merger, the Commission should implement conditions that prevent unreasonable discrimination in favor of the ILECs' own IP services and establish an unmistakable right to interconnect on an IP basis pursuant to Sections 251 and 252 for the exchange of traffic between a CLEC and the Qwest/CenturyLink ILEC. While the National Broadband Plan signaled a forthcoming FCC proceeding that could address IP interconnection, in the interim, Qwest and CenturyLink have refused to entertain requests for IP interconnection.

Specifically, to counterbalance the potential for discrimination or other anti-competitive conduct and to promote more efficient competition in the burgeoning marketplace for IP-enabled local services, Joint Commenters propose that the Commission require Qwest and CenturyLink to make interconnection on a IP-to-IP basis available to any requesting CLEC in accordance with the standards applicable under Sections 251 and 252 and the corresponding regulations applicable to LEC-to-LEC interconnection. In other words, as a result of this merger condition, a CLEC negotiating an interconnection agreement with Qwest or CenturyLink would be entitled to demand, and Qwest and CenturyLink would be required to provide, IP-based interconnection as one of the specified technically feasible interconnection architectures in that agreement for the exchange of all traffic covered by that agreement. Under this condition, at a minimum, the Applicants would be required to:

- Negotiate in good faith with any CLEC the terms, conditions and prices for IP interconnection in accordance with the standards applicable under Sections 251 and 252 and corresponding regulations applicable to interconnection and traffic exchange between LECs, and be prohibited from asserting that such interconnection is not required under Section 251.

- Provide, at a minimum, that at the requesting CLEC's option, the parties shall interconnect their networks using either TDM or SIP.

- At a minimum, for a SIP-based interconnection arrangement, the ILEC and the requesting CLEC shall exchange all signaling information necessary to allow the party receiving the traffic to convert it, if necessary, into TDM format, including all signaling information necessary to populate all relevant fields of standard SS7 signaling messages.

- To the extent that either the ILEC or the requesting CLEC sends the other LEC traffic that originated on the network of a third party that the sending LEC shall be responsible for converting such third party traffic into SIP format and for sending all PSTN signaling information that such LEC receives from the third party.

- For Meet Point Billing traffic sent via an SIP interconnection arrangement, the LEC providing the tandem functionality for the third party IXC shall record all information necessary to allow the LEC receiving the traffic to bill such third party IXC and provide that information to the other LEC, to the same extent as would apply to a TDM format interconnection.

- The ILEC and the requesting CLEC shall negotiate in good faith and in a commercially reasonable manner to establish any other technical or other matters necessary to establish a SIP-based interconnection in accordance with the standards applicable under Sections 251 and 252 and corresponding regulations applicable to interconnection and traffic exchange between LECs.

- Any disputes regarding the implementation of this condition can be heard by the applicable state commission as part and parcel of the interconnection agreement in which the relevant interconnection terms have been captured.

L. Pending Litigation Against CLECs

Before the state commissions of California, Colorado, Florida and New York,[231] Qwest, through its subsidiary Qwest Communications Company, LLC, has filed complaints against certain CLECs alleging, among other things, that each of these CLECs, either itself or via its affiliates, subsidiaries, or predecessors, had or has off-tariff, unfiled agreements for intrastate switched access services with select interexchange carriers (IXCs), not including Qwest. Qwest claims that these agreements offer intrastate switched access services at rates lower than the rates set forth in each of these CLEC's effective state tariffs or price lists. Qwest further asserts that these CLECs have not submitted these off-tariff arrangements to the relevant state commissions, have not disclosed all past and current off-tariff arrangements to Qwest, and have not provided Qwest the rates, terms and conditions received by the IXCs that are parties to the off-tariff arrangements.

Qwest asserts that these CLECs violated state law by engaging in rate discrimination to the detriment of Qwest, and by failing to abide by their tariffs or price lists and by failing to file off-tariff agreements with the relevant state commission for public inspection Qwest requests that these state commissions order these CLECs to pay Qwest reparations, with interest, in an amount to be proven at a hearing (in effect re-rating Qwest's traffic at the lowest rate provided by the CLEC to any IXC); order these CLECs to file with the relevant state commission, all currently-unfiled, off-tariff agreements for intrastate switched access services in the manner prescribed by law; and that these CLECs prospectively lower their intrastate switched access

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[231] *See* Qwest Communications Company, LLC v. MCIMetro Access Transmission Services, LLC *et al.*, Docket No. 08F-259T (Colo. P.U.C.); Qwest Communications Company, LLC v. MCIMetro Access Transmission Services, LLC *et al.*, Docket No. C.08-08-006 (Cal. P.U.C.); Qwest Communications Company, LLC v. MCIMetro Access Transmission Services, LLC *et al.*, Docket No. 090538-TP (Fla. P.S.C.); Qwest Communications Company, LLC v. MCIMetro Access Transmission Services, LLC *et al.*, Case No. 09-C-0555 (N.Y. P.S.C.).

rates to Qwest consistent with the most favorable rate offered to other IXCs in the relevant state. Qwest further requests that the relevant state commission order these CLECs to cease and desist from offering intrastate switched access services via unfiled, off-tariffed agreements with IXCs and that the relevant state commission grant any other relief it deems appropriate under the circumstances.

While the CLECs that remain parties to these complaint proceedings deny Qwest's allegations and the relief it seeks on various grounds, CLECs are spending significant resources defending themselves in these complaint proceedings and responding to discovery rather than spending such resources on becoming more effective competitors. In fact, after CLEC defendants in the California complaint proceeding spent significant resources answering Qwest's complaint, responding to numerous data requests, and filing motions to dismiss, among other things, the Administrative Law Judge ("ALJ") handling the complaint with the California Public Utilities Commission ("CA PUC") issued a draft decision on June 29, 2010 that dismissed Qwest's complaint.[232] The ALJ held that Qwest failed to state a claim upon relief can be granted because, based on a CA PUC decision issued more than 2 years ago, Qwest's claims do not allege a violation of California law or Commission regulation.[233] Stated differently, Qwest basically filed a complaint against a group of CLECs and required that they spend significant resources in defending themselves in the complaint proceeding where there was no violation of law. It is therefore abundantly clear that Qwest's complaint was designed, in part, to not only waste the resources of these CLEC, but also harass and intimidate them.

[232] *Qwest Communications Company, LLC v. MCIMetro Access Transmission Services, LLC et al.*, Docket No. C.08-08-006, Final Decision Dismissing Complaint - Proposed Draft Decision of ALJ Bushey, at 10 (Cal. P.U.C. June 29, 2010).

[233] *Id*.

The Commission has frowned on such gamesmanship, especially when evaluated during a merger application. As the Commission recognized when it evaluated the merger of two major ILECs, conduct by an incumbent LEC affects competitors "in areas both inside and outside the incumbent's region."[234] It explained that "[e]ffects outside the region (externalities or 'spillover' effects)[235] can directly or indirectly harm customers, whose business the incumbent LEC is seeking to gain."[236] It stated that:

> Spillover effects indirectly affect customers when an incumbent LEC's discrimination in one region increases a national rival's general costs, thereby indirectly impairing the ability of this rival to provide service to customers in other regions. For instance, a competitive LEC's entry into various areas usually entails fixed costs such as research, product development, and marketing costs that must be covered by the sum of the competitive LEC's area-specific profits. If SBC raises this competitive LEC's costs in Houston, less money is available to cover those fixed costs, and it is likely to become a less effective competitor in other areas such as Chicago, or it may forego entry into the Chicago market altogether. Regardless of the nature of the spillover effects, the intended result of discrimination is to reduce the ability of competitors to acquire and/or keep customers, that is, to increase the barriers to entry that competitors of incumbent LECs face.[237]

This is precisely what Qwest is trying to accomplish in the above-discussed litigation. Specifically, Qwest is trying to increase its CLEC rivals' general costs in one region, thereby indirectly impairing their ability to provide service to customers in other regions. Similar to the Commission's conclusion in the *SBC/Ameritech Merger Order,* if Qwest raises its CLEC rivals' costs in Colorado, California, Florida and/or New York, less money is available to cover the fixed costs these rivals incur to compete, which results in them being less effective competitors

[234] *SBC/Ameritech Merger Order*, ¶ 192.

[235] "Externalities, or spillovers, arise when an action by one party imposes costs or benefits on another party or parties." *See id* at n.352 (citing Robert S. Pindyck & Daniel L. Rubinfeld, *Microeconomics* (Prentice Hall, 4th ed. 1998) at 648). "A classic example of a negative externality is air pollution." *Id*.

[236] *Id*. ¶ 192.

[237] *Id*. (footnotes omitted).

in other markets or to forego entry into these other markets altogether. Likewise, there is no question that that through its litigation efforts, Qwest seeks to "reduce the ability of competitors to acquire and/or keep customers, that is, increase the barriers to entry that [these] competitors of [Qwest] face."[238]

For the foregoing reasons, Joint Commenters propose the following condition:

- Qwest shall: (1) withdraw the above-discussed complaints against CLECs with prejudice, (2) not file amended complaints against other CLECs in these proceedings, and (3) not file similar complaints against CLECs in any other jurisdiction. Upon merging, Applicants shall not file similar complaints against CLECs in any jurisdiction.

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[238] *See Id.*

VII. CONCLUSION

For the reasons discussed herein, the Commission may not conclude that grant of the application as filed would serve the public interest. The Commission should impose significant conditions, consistent with those proposed herein, on any approval of the proposed merger.

Respectfully submitted,

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Due: July 12, 2010

EXHIBIT A

	Qwest	Comment	CenturyLink	Comment
OSS				
OSS-System Conversion	XML SOAP transactions sent & processed by Qwest.	Transactions are embedded w/in process/PAETEC OSS.	No direct connectivity in place.	Add'l testing requirements needed due to OSS Conversion-Technical Implementation/End-to-End Testing.
OSS-Pre-Ordering/Ordering Availability (i.e CSR, AVQ)	ASR/LSR Pre-Order and Ordering Transactions sent.	Transactions are embedded w/in process/PAETEC OSS.	No direct connectivity in place.	Ensure all transactions will be supported electronically (not just UI).
OSS-Realtime v. Batch Processing	Real time processing	Responses are embedded w/in process/PAETEC OSS.	no real time; batch processing	Delayed order response vs. real time processing.
OSS-Edits	Back-end edit system checks order fields and will advise of incorrect field entries before accepting order. Function prevents submission of invalid orders		No back-end edit; order system order system accepts invalid orders that will later be rejected, and require the submission of a new order, which delays service installation.	Embarq system has back end edit function but not as thorough as Qwest
Order Intervals/Activity				
Order Activity/Limits			Standard intervals will apply to a maximum number of 50 orders (LSR, DSR, Porting) per day, per CLEC. Any CLEC with orders exceeding 50 per day may be subject to project management and will be worked on a best effort basis. *	Order Volume exceeds 50 orders daily w/ Qwest. This limit is 40X below the typical number if daily orders submitted by PAETEC.
Order Activity/Limits	Unaware of comparable activation limits imposed by Qwest		Activations are limited: DID, Type I, and Type II, to 100 per Carrier per day; POTS 50 per Carrier per day. *	Current PAETEC order activity significantly exceeds these limits.
Order Intervals-FOC Receipt	FOC Guidelines-24 hours		Upon receipt of a valid LSR, an FOC will typically be sent out for each LSR within 48 hours. However, order complexity may require additional time to process the order and post the FOC. *	24 hr FOC notification vs 48+ hrs. Although CenturyLink states it will publish FOC notification within 48 hours, past experience is that a signficant percentage of FOCs don't get published within the 48 hours, which results in a phone call
Order Intervals/Activity			Standard provisioning intervals do not apply if orders are in excess of 20% of those forecasted by CLEC. *	Profile Maintenance and Forecasts - can order volumes be supported w/ profile updates.
ASR/LSR Interval comparison	Very detailed documentation of processes and intervals; material is updated every 6 months		Limited documentation of process and procedures; published intervals are difficult to obtain. Typically resort to contacting by phone	Embarq documentation is better than CenturyTel

Address Validation	SAG data dump available	SAG data is available for extraction monthly and MSAG on a quarterly basis at no charge. The data is provided in a computer readable format. This is critical for pre-order validation prior to order submission.	MSAG View available-online	Embarq also only allows a viewing of MSGA and SAG data. Data extraction does not appear to be available.
911	Qwest customer records that are available to CLEC include end user address, local service office, and wire center. Enables CLEC to (a) submit an order for service or elements identifying the correct wire center from which service is requested, (b) route traffic to the cirrect PSAP, and properly trunk 911		Embarq system only validates end user address as being valid. System does not provide local serving office or rate center, which makes it impossible to ensure that 911 will work for the end user without making manual inquiries to obtain these critical data points.	
Hours of Operation/Escalation Contacts	http://www.qwest.com/wholesale/clecs/customercontacts.html	Qwest has historically issued prompt outage notifications	CenturyLink Internal Repair Center Escalation **First and Second Level Escalation** **Mon-Fri, 7am - 4pm** http://www.centurylink.com/business/Wholesale/InterconnectionServices/Contacts/Escalation/	In addition to shorter hours, CenturyLink consistly fails to broadcast outage notifications.
Line Loss Notification	Five different ways to access/receive line loss reports	Loss reports are generated on a daily positive basis, whether there is data to report or not. This prevents any question as to whether or not a file was made available on succeeding days. Line Loss Notification is received electronically from Qwest; high amount of flow-through automation is currently in place- order is automatically triggered off of receipt of line loss notification.	sent via e-mail	Requires CLEC to search the list for specific line loss

* Concerns taken from CenturyLink Service Guide:
http://www.centurylink.com/business/Wholesale/InterconnectionServices/Library/CenturyTelServiceGuide.pdf